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IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-1220

JAMES R. RICHARDSON,
Petitioner,

v.

HAMILTON INTERNATIONAL CORPORATION, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1972.

No. .

JAMES R. RICHARDSON,

Petitioner,

v.

HAMILTON INTERNATIONAL CORPORATION, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner, plaintiff in the proceedings below, respectfully prays that a writ of certiorari issue to review the judgment of the court of appeals entered on November 17, 1972.

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OPINIONS BELOW.

The opinion of the court of appeals (reported in CCH Fed. Sec. L. Rep. ¶ 93,675) is reprinted in the Appendix, *infra*, pp. A2-A7. The Memorandum Opinion of the district court granting respondents' Motion to Dismiss is reported at 333 F. Supp. 1049 (E. D. Pa. 1971) and appears in the Appendix, *infra*, pp. A10-A22.

JURISDICTION.

The judgment of the court of appeals was entered on November 17, 1972 (Appendix, *infra*, p. A8). Petitioner filed a timely petition for rehearing by the court en banc, which was denied by order entered on December 11, 1972 (Appendix, *infra*, p. A9). The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

This action was brought by petitioner as a shareholder of respondent corporation to redress alleged violations of federal securities laws. Respondents moved to dismiss petitioner and disqualify his firm as counsel. Petitioner, an attorney, had performed legal services for certain of the named defendants in a prior, unrelated SEC investigation. The district court granted respondents' motion, bottoming its holding on certain of the Canons of Professional Ethics of the American Bar Association, as incorporated by Local Rule 11 of the Eastern District of Pennsylvania.

Three important questions are presented for review:

1. Did the outright dismissal of petitioner's cause of action pursuant to a local rule of practice exceed the permissible scope of the Rules Enabling Act and the proper *procedural* scope of local rules of court?

2. Where petitioner's disqualification turned primarily on an inference or "appearance" of "impropriety", was the dismissal of his cause of action an abuse of the court's discretion under recognized tests developed to cope with the question of disqualification of attorneys representing conflicting interests?

3. Where the petitioner had a substantial investment in the defendant corporation, was the dismissal of his action a deprivation of property without due process of law, in contravention of the Fifth Amendment to the Constitution of the United States?[1]

---

1. Petitioner presents the due process question last in deference to settled constitutional doctrine. Although the issue is submitted as a central defect in the result below, and not as a peripheral contention, it seems clear that the initial arguments (under the Enabling Act and supervisory authority of this Court) may be dispositive of the serious questions raised by petitioner's dismissal. Accordingly, it may be unnecessary to reach the constitutional question.

CONSTITUTIONAL PROVISION, STATUTE, ETHICAL CANONS, AND RULES INVOLVED.

(a) The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

(b) The (Federal) Rules Enabling Act, 28 U. S. C. § 2072; 62 Stat. 961 (1948), as amended by 80 Stat. 1232 (1966), provides:

> "The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in Civil Actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of the decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.
>
> "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

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"Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

"All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."

(c) Rule 83 of the Federal Rules of Civil Procedure (promulgated pursuant to the Enabling Act) provides:

"Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

(d) Canons 4 and 9 of the A. B. A. Code of Professional Responsibility:

Canon 4 of the A. B. A. Code of Professional Responsibility ("A Lawyer Should Preserve the Confidences and Secrets of a Client") and Canon 9 ("A Lawyer Should Avoid Even the Appearance of Professional Impropriety") are quite lengthy. The Ethical Considerations, Disciplinary Rules, and Notes of those two Canons are reproduced in the Appendix, *infra*, at pp. A23-A24.

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(e) The A. B. A. Canons of Professional Ethics, Canons 6 and 37, provide:

6. Adverse Influences and Conflicting Interests.

"It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

"It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this Canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

"The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

37. Confidences of a Client

"It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees, or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employ-

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ment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

"If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened."

(f) Rules of Civil Procedure; United States District Court for the Eastern District of Pennsylvania:

Rule 11. *Canons of Ethics*

"The Canons of Ethics of the American Bar Association as now existing shall be and as hereafter modified shall become standards of conduct for attorneys of this Court."

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STATEMENT OF THE CASE.

Petitioner, James M. Richardson, a practicing attorney, brought this action as an aggrieved shareholder of defendant Hamilton International Corporation ("Hamilton" or "Hamilton International"), on behalf of himself and a class of shareholders similarly situated, and as a derivative action. The basis for federal jurisdiction in the first instance was § 27 of the Securities Exchange Act of 1934, 15 U. S. C. § 78aa; § 22 of the Securities Act of 1933, 15 U. S. C. § 77v; and pendent jurisdiction.

The cause of action arose as a result of a 1969 merger of Alexander Hamilton Life Insurance Company of America ("Hamilton Life") into a wholly-owned subsidiary of Hamilton International. Petitioner was a shareholder of Hamilton Life (a Michigan corporation) prior to the merger and became a shareholder of Hamilton International (a Delaware corporation) as a result of it. Petitioner's share ownership in Hamilton Life (and subsequently in Hamilton International) represented his largest single investment (Rich. App. 131a).[2]

A proxy statement was issued on May 19, 1969, in connection with this merger, and petitioner received the statement by mail, as did the other shareholders of record. The gravamen of the complaint in this action revolves around omissions and misstatements in this proxy statement, which allegedly violated applicable federal securities laws and common law fiduciary obligations. These frauds centered around a deceptive scheme contrived and executed to enable five of the individually named defendants to increase their proportionate ownership and voting control in Hamilton Life at the expense of shareholders, and

2. "Rich. App." references the appendix filed by petitioner Richardson in the court of appeals below, a copy of which is filed herewith.

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otherwise to manipulate the assets of Hamilton Life for their own personal benefit (Rich. App. 8a-9a). Richardson charged that the merger with a subsidiary of Hamilton International (owned 96% by six of the individually named defendants) was engineered to effectuate this fraudulent scheme.

None of the acts alleged in the complaint took place prior to 1967 and it was stipulated by petitioner's counsel that the omissions, misstatements, conspiracies, acts and frauds alleged all took place in 1967 and thereafter (Rich. App. 8a, 138a-141a). The relief sought included dissolution of the merger, substantial damages, an accounting by the individual defendants, and other equitable relief.

Prior to the acts and occurrences alleged in the amended complaint, petitioner had performed legal work for Hamilton Life. This prior representation was the basis upon which the district court granted respondents' motion to dismiss. The circumstances of Richardson's role as counsel for Hamilton Life are essentially as follows.

Richardson graduated from law school and was admitted to the bar in 1955. His initial employment as an attorney was with the Philadelphia firm of Schnader, Harrison, Segal & Lewis ("SHS&L"), where he was associated for fourteen years. Subsequently, after a year as a vice president of Union Fidelity Corporation, Richardson became a partner in the law firm of Rosen & Richardson, later Pechner, Sacks, Dorfman, Rosen & Richardson ("Pechner firm"). SHS&L acted as defendants' counsel and the Pechner firm, by Paul Rosen, Esquire, acted as petitioner's counsel in the proceedings below.

While an associate with SHS&L, Richardson assisted in the representation of Hamilton Life during an informal SEC investigation into an intra-state offering of that company which had recently been completed in Michigan. This

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investigation focused upon the availability of the intrastate offering exemption from federal securities laws and the activities of Armstrong, Jones & Co., a Detroit "market-maker" in Hamilton Life's stock (Rich. App. 67a-68a, 123a-124a, 149a). Beginning in 1964 and continuing through June 1966, Richardson recorded some 669 hours of work in behalf of Hamilton Life, the bulk of which was completed in 1964-1965 (Rich. App. 206a-207a).

The SEC investigation in which Richardson participated involved informal SEC hearings in Washington in June 1965 which went primarily to the relationship between certain of Hamilton Life's officers and Armstrong, Jones & Co., the "market-maker." Those informal hearings resulted in an SEC Order for formal hearings issued October 14, 1965 (Rich. App. 126a-127a). At approximately that point, SHS&L's role as counsel for Hamilton Life in the SEC investigation ceased, and in the formal hearings which ensued, Hamilton was represented by Pope, Ballard law firm in Chicago (Rich. App. 158a). The reason for the substitution is unexplained on the record, and petitioner is unaware of what impelled Hamilton Life to change counsel.

Subsequently, Richardson performed some further minor legal work for the company, involving registration of stock options, which terminated in June 1966 (Rich. App. 153a). These minor chores are unrelated to either the prior or present representations. The basic representation in which Richardson participated ceased in October of 1965, and all legal work for Hamilton Life ceased by the first half of 1966. It was during this period that Richardson made his initial purchase of Hamilton Life stock. His last purchase was made in 1966 after his representation terminated. At the time of this lawsuit, he owned 1,100 shares (Rich. App. 54a, 104a).

Despite the termination of his role as counsel, petitioner continued to hold shares of Hamilton Life "as an

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investment for long term capital appreciation." (Rich. App. 54a). Richardson learned of the frauds and non-disclosures alleged in the complaint by carefully studying and comparing the May 19, 1969 proxy statement which preceded the merger with a Hamilton Life prospectus issued February 1, 1968 (Reproduced Rich. App. pp. 176a, et seq.). He did not obtain this prospectus through SHS&L or through his prior representation of the company (Rich. App. 131a-132a). After concluding that the May 19, 1969 proxy statement was deficient and misleading, Richardson wrote to defendant Owens, prior to the meeting, stating his views. Receipt of the letter was acknowledged, but no action was taken (Rich. App. 55a). Petitioner in November 1969 made written demand for remedial action and threatened a lawsuit, and again no action was taken (Rich. App. 55a).

The facts as adduced prior to the granting of respondents' motion to dismiss by the district judge showed no connection between the prior representation and the allegations contained in the amended complaint.[3]

3. The original complaint filed in this action (March 1971) alleged that the payment of $100,000 in legal fees to Pope, Ballard, which accrued to the benefit of individual defendants Owens, Bruce and Safford, was a material omission. These fees were paid for the subsequent proceedings (the formal hearings) conducted by the SEC after SHS&L's representation of Hamilton Life in that matter terminated. The three officers and Armstrong, Jones were parties to those hearings; Hamilton Life was not.

The amended complaint, filed in July, 1971, deleted the allegation with reference to $100,000 in legal fees as against Hamilton, retaining the charge only against Lybrand, Ross Brothers & Montgomery ("Lybrand"), Hamilton's independent accounting firm. Defendants' made much of this deletion in a long colloquy during petitioner's deposition taken in connection with the motion to dismiss. (See Rich. App. pp. 104a, et seq.) However, the facts are that Richardson learned of the $100,000 in counsel fees (and of their impropriety) in a manner wholly independent of his former representation; and the deletion of the allegation was not undertaken to avoid an imputation of conflict of interest, as respondents attempted to suggest in the proceedings below.

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3. (Cont'd.)

The prospectus of February 1, 1968 (Rich. App. pp. 176a, et seq.) made a full disclosure of the payment of legal fees to Pope, Ballard to defend Owens, Bruce, and Safford in SEC administrative proceedings to which Hamilton Life was not a party. That prospectus also disclosed that the SEC had notified the company of the impropriety of paying these fees under SEC Rule 460(a). Richardson confirmed the payment of legal fees through subsequent correspondence with counsel for Hamilton Life (Rich. App. 119a). This disclosure was pointedly omitted from the May, 1969 proxy statement, which led to its inclusion in the original complaint as one of the material non-disclosures of that latter proxy statement. Richardson did not learn of the payment of legal fees through his prior representation of Hamilton Life, but rather via his comparison of the February 1968 prospectus which *had* disclosed SEC objections to the payment of those fees.

In the February 1968 prospectus, Hamilton Life also indicated a willingness to abide by the terms of SEC Rule 460(a)—to wit, submitting the questions of the propriety of payment of attorneys' fees to a court of competent jurisdiction. The prospectus also stated that the three officers involved had acceded to this course of action. Prior to the filing of the original complaint, petitioner had no indication that Hamilton International or its subsidiary Hamilton Life had taken any steps to recapture the $100,000 in attorneys' fees paid by it on behalf of the officers. Hence, the allegation was included in the original complaint. Subsequent to the filing of the original complaint in March 1971, Paul Rosen, counsel for (and partner of) petitioner, read in the SEC Digest of a new registration statement and prospectus for an offering of securities that had been filed by Hamilton International. Petitioner's counsel sent for this prospectus and in due course received a copy. In perusing it, petitioner and his counsel noted a disclosure on page 5 of an action initiated in the Eastern District of Michigan by Hamilton Life to determine the question of whether or not Hamilton Life should be indemnified by its officers for the $100,000 in fees. The prospectus also stated that the three officers had agreed to abide by Rule 460(a) and the outcome of any hearing to determine their liability thereunder. Accordingly, Hamilton having satisfied any reasonable demand for relief which could have been made against it for payment of the legal fees, petitioner amended the complaint. The allegation against Hamilton Life and the individual defendants was deleted, and it was retained only as against Lybrand for certifying the proxy with the material non-disclosure.

This explanation was made in full during the oral argument in the court of appeals, in response to a query from Judge Rosenn (See COA Trans.* p. 7. The prospectus which disclosed the pend-

* "COA Trans." references the transcript of oral argument in the Court of Appeals, filed herewith.

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In his affidavit in support of a motion for class action determination [4] under Rule 23, Fed. R. Civ. P., Richardson set forth the facts leading to his discovery of material frauds in the May 1969 proxy statement. In that affidavit, he candidly related the circumstances of the prior representation and asserted that it ceased in "October or November of 1965." Richardson stated that other counsel was appointed at that time and ". . . subsequent to that time affiant has had no involvement in any legal matters of Hamilton Life." (Rich. App. 55a).[5] In this affidavit petitioner also affirmed that the instant action centered entirely upon problems of "non-disclosure and misrepresentation of material facts" in the May 1969 proxy (Rich. App. 56a).

Defendants moved to dismiss, asserting that "There is a substantial relationship between plaintiff's prior repre-

3. (Cont'd.)
ing action in the Eastern District of Michigan, and was received by petitioner subsequent to the filing of his original complaint, is excerpted in the Appendix at pp. A36-A38). The district judge (D. C. Trans.** page 48) recognized that the question of $100,000 in legal fees was out of the case. It remained only insofar as Lybrand's alleged misconduct was concerned, and Lybrand has not sought to appeal the denial of its motion to dismiss. (See p. 14, *infra*).

** "D. C. Trans." references the transcript of oral argument in the district court, filed herewith.

4. Disposition of the class action motion was postponed pending resolution of respondents' motion to dismiss petitioner and disqualify his firm as counsel.

5. As related *supra*, p. 10, Richardson had performed some minor legal chores relating to stock options through June of 1966; however, the bulk of this representation in the SEC informal proceedings did cease in October of 1965 with the appointment of Pope, Ballard in Chicago as new counsel for Hamilton Life and its officers. When Richardson swore and subscribed this affidavit, of course, he had no access to SHS&L's time records, and the additional work performed for Hamilton Life was discovered from time records produced at Richardson's deposition. The work was of such negligible scope that Richardson had no recollection of it prior to being deposed.

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sentation of Hamilton Life and the instant case." (Rich. App. 58a). Lybrand joined separately in the motion to dismiss. On November 3, 1971, the District Court (Van Artsdalen, J.) granted the motion to dismiss as to all defendants other than Lybrand. Lybrand took no steps to appeal.

Respondents' contention of a "substantial relationship" between petitioner's former representation of Hamilton Life and the instant case *sub judice* were grounded on a legal test which has evolved to handle disqualification of *counsel* motions under the A. B. A. Canons of Professional Ethics ("Canons") and Code of Professional Responsibility ("Code"). Under this test, where there is a substantial relationship between an attorney's present representation and a prior, adverse representation, the attorney will be disqualified and the plaintiff will be compelled to retain new counsel.

The district court adopted the "substantial relationship" test, stating: "The test is whether the issues raised in this complaint are substantially related to the subject matter of the former representation." (Appendix, *infra*, p. A19). Disqualification of the petitioner's firm and dismissal of his cause of action was bottomed solely on the following "findings":

(1) ". . . both matters embrace SEC regulations and requirements."[6]

(2) "The issues raised by the complaint will deal undoubtedly with the stock ownership of the various defendants and their relationship with the corporations involved. Certainly some, if not all, of these questions were raised by the SEC investigation in 1965."

6. The 1965 SEC investigation was a 1933 Act proceeding. The complaint in the instant case is based primarily on the 1934 Securities Exchange Act.

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(3) "Certain confidences may have been reposed in Mr. Richardson at the time when he, through the Schnader firm, represented Hamilton Life that would be material and relevant to the present litigation."

(4) "It is entirely possible that the [fraudulent merger scheme] originated or developed in 1964-1965 and depended on the outcome of the SEC investigation at that time."

(5) "Mr. Richardson became a shareholder of Hamilton Life during the time he was representing that company."

(Appendix, *infra*, pp. A19, A22)

Relying on these findings, and on the Canons, the district court held that petitioner was disqualified and granted respondents' motion to dismiss:

> "Defendants allege [that 'certain confidences may have been reposed in Mr. Richardson . . . that would be material and relevant to the present litigation.'] If, in fact, such is the case, then the matters are substantially related and plaintiff could be disqualified. I feel that it is a close question *but to avoid the 'appearance of evil'* disqualification must be directed." (Appendix, *infra*, p. A19) [Emphasis added.]

The court of appeals affirmed, looking to the more contemporary Code of Professional Responsibility rather than the Canons. It found that the district judge was "justified in concluding that the information Mr. Richardson received in the prior SEC action *might* be related to the subject matter of his subsequent representation." (Appendix, *infra*, p. A5). [Emphasis added.] It also concluded that ". . . a court may disqualify an attorney not

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only for acting improperly, but also for *failing to avoid the appearance of impropriety*" (Appendix, *infra*, p. A6). [Emphasis added.]

The disposition of the motion to dismiss by the courts below leaves this action in a bizarre stance, procedurally and substantively. Petitioner's action has been dismissed *on the merits* insofar as Hamilton and the individual defendants are concerned, and he is presumably barred from sharing in any future class recovery against those named defendants. As against *them*, his rights to redress are defeated.

Nevertheless, an incipient class action remains against Lybrand (the independent accountant), with petitioner as the nominal representative party. The class action motion has not yet been presented or decided, because all issues in the litigation were postponed pending disposition of the motion to dismiss.

In the interim, a class action without a named plaintiff or representative party also remains pending against Hamilton and the individual defendants. A motion by one Owen Johnson to intervene as party plaintiff is being vigorously opposed by all defendants in the subsequent proceedings below. The grounds for contest include, *inter alia*, laches, conflict with the pending action against Lybrand, and improper venue.[7]

Nearly two years have passed since the initial filing of the complaint and much of the argument below has centered upon laches and the likely running of the statute of limitations. A class exists, but the plaintiff and attorneys who sought to protect its interests have been dismissed. This is only an outline of the immensely complex procedural problems occasioned by the dismissal on the merits challenged in this petition.

7. The motion was granted just prior to the filing of this petition.

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REASONS FOR GRANTING THE WRIT.

Introduction.

This case presents contemporary questions of wide importance for the federal courts.

(1) Purportedly applying prevailing standards of professional ethics as incorporated by local rule of practice, the lower courts have destroyed petitioner's substantive rights in clear contravention of the mandate of this Court, speaking in its supervisory capacity, and of the command of Congress in the Rules Enabling Act. The A. B. A. Code of Professional Responsibility and Canons of Professional Ethics, which were the asserted grounds for petitioner's dismissal, are widely applicable throughout the entire system of federal courts (See Part E, *infra*). This total deprivation of petitioner's cause of action because of a purported "appearance" of impropriety raises deep questions about the scope of the rulemaking power of the federal courts and the limits on lower court implementation of rules which trespass upon substantive rights.

(2) Petitioner's due process rights to a voice in the federal courts are also fundamentally at issue. The dismissal of his action and the implicit damage to his reputation have amounted to little more than adjudication by innuendo.

(3) The decision below has raised a clear conflict of the circuits in the proper construction of the "substantial relationship" test commonly used to decide the question of whether an attorney should be disqualified for representation of prior conflicting interests. The misconstruction of that standard by the courts below places the Third Circuit squarely in conflict with the Second and Fifth Circuits on the proper scope of that test.

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(4) Throughout this litigation the lower courts have consistently ignored the salient fact that petitioner brought suit to protect his own substantial investment of some eleven hundred shares of stock. Thus, the overriding issue in this case—consistently ignored below—is whether or not the federal courts can close their doors to litigants upon a mere "hint" of impropriety. Good legal ethics also encompass a concern for the substantive rights of litigants as well as a commitment to a public image of irreproachable propriety.

In essence, a concern for "ethical propriety" has been carried to hysterical extremes in the decisions below. In the process, petitioner has had his substantive rights totally abrogated. It is unfortunate that the intense current concern with legal ethics, coupled with the wide applicability of the Code of Professional Responsibility, makes this case a threat to the rights of every practicing attorney. Nevertheless, only this Court can prevent the spectral presence of this decision as a "leading" case, going far beyond every other applicable precedent in the field.

The reasons suggested for issuance of the writ are more fully set forth in the sections which follow:

A. Both the District Court's "Disqualification" of Petitioner as a Plaintiff, and the Court of Appeals' Affirmance of That Dismissal Are Grounded Primarily Upon a Desire to Avoid an "Appearance" or "Inference" of Impropriety.

In granting respondents' motion to dismiss, the district court bottomed its holding on the Canons of Professional Ethics, and the Court of Appeals affirmed on the basis of the Code of Professional Responsibility.

The thrust of the relevant provisions of both the Canons and Code is that a lawyer should avoid the "ap-

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pearance" of impropriety and preserve the confidences of a client.

Petitioner, a respected and upright member of the bar, has no quarrel with these desirable goals. Nevertheless, the central point advanced in this petition (a thesis which pervades all three questions posed for review), is that tenuous and unwarranted suppositions about an "appearance" of impropriety are plainly insufficient to bar an attorney from pursuing his *own cause of action* in the federal courts.

Even a cursory perusal of the two opinions in this proceeding inescapably reveals that both lower courts dismissed petitioner because his action raised an inference of impropriety.

Thus, the district court held, *inter alia:*

> "Certain confidences *may* have been reposed in Mr. Richardson at the time when he, through the Schnader firm, represented Hamilton Life that would be material and relevant to the present litigation. Defendants allege this is so in effect. *If in fact, such is the case,* then the matters are substantially related and plaintiff could be disqualified. I feel that it is a close question, but to avoid the *'appearance of evil'* disqualification must be directed."
>
> • • •
>
> "Mr. Richardson became a shareholder of Hamilton Life during the time when he was representing that company. I point this out not to infer that this was improper, but only to show that it may *hint of some impropriety,* and it is this *suggestion of impropriety* that I feel must be avoided."

(Appendix, *infra,* pp. A19, A22) [Emphasis added.]

There is no indication of any other ground, factual or legal, for the district court's holding. Apparently, respond-

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ents' motion to dismiss was granted in a prophylactic attempt to avoid having aspersions cast upon the legal profession.

The court of appeals was moved by identical considerations:

> "While we do not doubt that Mr. Richardson acted in good faith and had the best interests of his class at heart when he brought this suit, we do not believe that he should be permitted to place himself in a position where, even unconsciously, he will be tempted, or it *appears to the public and his former clients* that he might be tempted, in the interest of his new client, to take advantage of information derived from confidences placed in him by Hamilton Life and its officials.
>
> • • •
>
> "Whenever an allegation is made that an attorney has violated his moral and ethical responsibility, an important question of professional ethics is raised. It is the duty of the district court to examine that charge, since it is that court which is authorized to supervise the conduct of the members of its bar. The courts, as well as the bar, have a responsibility to maintain public confidence in the legal profession. This means that a court may disqualify an attorney not only for acting improperly, but *also for failing to avoid the appearance of impropriety.*" [n]

[n.] quoted key portions of Code of Professional Responsibility, Canon 9, "A Lawyer Should Avoid Even the Appearance of Professional Impropriety".

(Appendix, *infra*, pp. A30-A34) [Emphasis added.]

The court of appeals couched its discussion in terms of disqualification and spoke of petitioner's "new client." Thus, in addition to affirming the amorphous reasoning of

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the district court, there is a serious question as to whether or not the court of appeals even understood that Richardson's rights to redress as a plaintiff were at issue.

B. The Outright Dismissal of Petitioner's Cause of Action on the Merits, Pursuant to a Local Rule, Exceeded the Authorization of the Rules Enabling Act and the Proper Procedural Scope of Local Rules of Court.[8]

Conceding *arguendo* that a district court's reasonable regulation of the conduct of attorneys who constitute its

8. It is appropriate at this juncture to note that this contention, as well as petitioner's arguments bottomed on the Due Process Clause (Part D, *infra*) were not briefed in the proceedings below. Rather, they were raised in oral argument, partially for the purpose of preservation on appeal.

Petitioner candidly concedes that he deemed it unnecessary to stress these points below simply because it appeared incontrovertible that no "substantial relationship" (the relevant legal test for disqualification of *counsel*) could be found on the record. Hence, primary reliance was placed on the contention that there was no relationship, substantial or otherwise, between the present action and the prior representation.

Nevertheless, in oral argument in the district court, Judge Van Artsdalen, *sua sponte*, noted the distinction that petitioner was suing as a *plaintiff*, whereas the relevant cases cited to the court spoke only to the issue of representation. Defendants' counsel was compelled to concede that this aspect of the case at bar was "unique." [D. C. Trans., p. 17].

Later in the argument, petitioner's counsel also distinguished the fact situation—again on the basis that Richardson was suing as *plaintiff* and had a substantive right to a remedy at law. He conceded the "inherent equity" of the court and its regulatory power over attorneys, but further argued that the contention of unprofessional conduct had no place in the motion to dismiss. Rather, the proper arena was a disciplinary action by the court under Local Rule 13. Finally, counsel raised the due process argument presented herein in Question 3. Petitioner's counsel frankly stated that he had not briefed the two issues and was raising them largely for the record.

The relevant portions of the oral argument in the district court are set forth in the district court transcript, at pp. 17-18; 51-52. A copy of the full transcript [D. C. Trans.], along with the transcript of oral argument in the court of appeals [COA Trans.] has been filed herewith with the Clerk of the Court.

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bar is a procedural matter within its statutory and inherent authority,[9] petitioner submits that the instant case presents a far more difficult problem. In short, the outright dismissal of a cause of action which operates as an adjudication on the merits cannot be hinged under the rubric of "procedure"—despite any inherent power to regulate conduct—except under certain extreme conditions which clearly do not obtain in this case. More particularly, such a disposition cannot stand where it represents the implementation of a "procedural" rule and is bottomed by only the most tenuous of suppositions—a potential "appearance" of impropriety to a former client.

It is, of course, axiomatic that court rules have the force of law. See 28 U. S. C. § 2072; *Link v. Wabash Railroad Co.*, 291 F. 2d 542 (7th Cir. 1961), *aff'd*, 370 U. S. 626; *Woods Construction Co. v. Atlas Chemical Industries*, 337 F. 2d 888 (10th Cir., 1964).

Petitioner's dismissal below was based on the A. B. A. Canons (affirmance by the court of appeals was bottomed on the A. B. A. Code), incorporated as a rule of court by local rule 11 of the Eastern District of Pennsylvania. Local rules of district courts are authorized by Rule 83, Federal Rules of Civil Procedure. This outcome is squarely contrary to the Federal Rules Enabling Act, 28 U. S. C. § 2072 [62 Stat. 961 (1948) as amended, 80 Stat. 1323 (1966)].

The Enabling Act states, in relevant part:

> "Such rules [of Federal Procedure] shall not abridge, enlarge, or modify *any substantive right* and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

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9. Cf. *Cord v. Smith*, 338 F. 2d 516, 524 (9th Cir. 1964) (Federal, not state rule on attorney disqualification governs a diversity suit in federal court).

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This Court has long recognized that the proper scope of Federal Rules of Civil Procedure promulgated pursuant to the Enabling Act is *procedural* and not substantive. *Klaxon v. Stentor,* 313 U. S. 487, 61 S. Ct. 1020 (1941); *United States v. Sherwood,* 312 U. S. 584, 61 S. Ct. 767 (1941); *Sibbach v. Wilson & Co.,* 312 U. S. 1, 61 S. Ct. 422 (1941).

The Rule was explicitly expounded in *Sherwood:*

> "An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction and the [Rules Enabling Act], authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to *modify, abridge,* or *enlarge* the *substantive rights of litigants* or to enlarge or diminish the jurisdiction of federal courts." 312 U. S. 584, at 590. [Emphasis added.]

Sibbach, too, is particularly crucial in this regard, for it recognized that a federal rule which, *as implemented,* affects substantive rights, cannot control, though the challenged rule be perfectly proper in the majority of its applications. It is plain that the complete dismissal of petitioner's cause of action eviscerates his substantive right as a shareholder, granted by applicable federal securities laws and cases thereunder, to sue to protect his considerable investment. *J. I. Case Co. v. Borak,* 377 U. S. 426, 84 S. Ct., 1555 (1964); *Superintendent of Life Insurance v. Bankers Life & Casualty,* 404 U. S. 6 (1971); *Mills v. Electric Auto-Lite,* 396 U. S. 375, 90 S. Ct. 616 (1970). The creation of a right of action must clearly be classed as "substantive" and not "procedural." *McNichols, et al. v. Lennox Furnace Co.,* 7 F. R. D. 40 (N. D. N. Y. 1947); cf. *Washington-Southern Nav. Co. v. Baltimore & Philadelphia Steamboat Co.,* 263 U. S. 629, 44 S. Ct. 220 (1924).

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The procedural ambit of rules of court and the right of a litigant to sue are so fundamental to federal courts that they were recognized well *before* the passage of the Enabling Act, which merely codified the prevailing doctrine. The rule was well stated by Mr. Justice Brandeis in *Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co., supra,* 263 U. S. 629, 635:

> "• • • The right of a citizen of the United States to sue in a court having jurisdiction of the parties and of the cause of action includes the right to prosecute his claim to judgment.
>
> "• • • The function of rules is to regulate the practice of the court and to facilitate the transaction of its business. This function embraces, among other things, the regulation of the forms, operation and effect of process; and the prescribing of forms, modes and times for proceedings. Most rules are merely a formulation of the previous practice of the courts. Occasionally, a rule is employed to express, in convenient form, as applicable to certain classes of cases, a principle of substantive law which has been established by statute or decisions. But no rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law. This is true of rules of practice prescribed by this court for inferior tribunals, *as it is of those rules which lower courts make for their own guidance under authority conferred.*" [Emphasis added.]

Washington-Southern clearly established that local rules of court are confined to a narrow, procedural scope—the same result obtained by looking to the Enabling Act and its authorization of the local rules.

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Petitioner has discovered only one other federal case which disqualified an attorney as a *plaintiff*, dismissing his cause of action entirely, under the Code of Professional Responsibility as incorporated by a local rule of court. *Doe v. A. Corp.*, 330 F. Supp. 1352 (S. D. N. Y. 1972) *aff'd sub nom. Hall v. A. Corp.*, 453 F. 2d 1375 (2d Cir. 1972). That case involved such an egregious violation of the attorney-client privilege that it is entirely distinguishable from the case at bar. Doe, the plaintiff, was an attorney with the X law firm. The A Corporation was a "primary client" of the X firm, and Doe, while employed by the X law firm, worked closely with all of the defendants. The X firm notified Doe that his association with them was to be terminated. When Doe learned of his impending dismissal, he purchased *one* share of A corporation stock, and later brought a stockholders' class action and derivative suit. Doe conceded that "every fact alleged in the complaint and upon which this suit is based was acquired by him while associated with the X firm and engaged in legal work for the defendants as clients of the firm." 330 F. Supp. at 1354. Dismissal of the complaint without prejudice to the rights of shareholders was directed, bottomed on Canon 4 of the Code and Disciplinary Rule 4-101 thereunder—Preservation of Confidences and Secrets of a Client (Appendix, *infra*, pp. A23-A29). Doe was in flagrant violation of that Canon.

The situation in *Doe v. A Corp., supra*, presents the only other case where the lower federal courts have confronted the important questions which inhere in a complete dismissal of an attorneys' suit against a former client. The extreme nature of the facts in that case imply that it can easily be characterized as a "sham" exception to the normal rule that an attorney has a right to protect his interests *despite* a former representation. Doe had no arguable financial interest in the fate of A Corporation

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and sought to capitalize *solely* on his prior representation. Petitioner, by contrast, has a considerable financial interest in Hamilton, which was not acquired improperly or for an improper motive. Further, Petitioner stoutly maintains (with nothing in the record or underlying facts to contradict him) that there is no relation whatsoever between the two causes of action.

Where an attorney sues a former client, the American Bar Association itself has recognized an exception to the confidentiality rule of Canon 4 of the Code. While this situation normally arises when an attorney sues a former client for a fee, it is not necessarily confined to such instances. See Note 19 to Disciplinary Rule 4-101 of Canon 4 of the Code (Appendix, *infra*, p. A29), stating in part:

> [Quoting Mechem on Agency] "* * * So if it becomes necessary for the attorney to bring an action against the client, the client's privilege could not prevent the attorney from disclosing what was essential as a means of obtaining or defending his own rights."

Thus, the A. B. A. notes an exception to the rule of non-disclosure where the attorney is a party litigant to the proceeding—apparently in recognition of the substantive rights of the lawyer. The overreaching result below, where petitioner steadfastly maintained that no disclosures were involved and the actions were unrelated, arguably involved a complete misconstruction of the scope of the Code and Canons. This is a question of considerable importance considering the widespread applicability of these standards throughout the federal courts.[10] Where the basis of the holding below is pure conjecture, the result in the Third Circuit should not be allowed to stand as the guiding precedent for a novel question of law.

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10. We note *infra* at p. 36, that the Code is applicable *in terms* by local rule in over thirty district courts, and is indirectly applicable in most of the remainder by imputation from state law.

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That question may be phrased as follows: To what extent may an attorney have his *own substantive rights* prejudiced under the A. B. A. Code, as weighed against the broad command of Congress in the Enabling Act, and of this Court, not to impair or abrogate the substantive rights of litigants?

Time and time again, this Court has upheld implied private causes of action under the federal securities laws. *J. I. Case Co. v. Borak, supra; Mills v. Electric Autolite, supra; Affiliated Ute Citizens of Utah v. United States,* 92 S. Ct. 1456 (1972). These rights are plainly substantive. The Rules Enabling Act and rules promulgated thereunder cannot be employed to diminish substantive rights; nor may local rules of court abridge that limitation. Surely a cause of action to vindicate one's rights, freely granted other wronged parties under federal statutes, falls outside of the procedural area in which the federal courts are left with wide discretionary power, subject to the supervisory authority of this Court.

Thus, the district court may have wide powers to regulate the conduct of attorneys who comprise the bar of its court. Arguably, this may even extend to disqualification of *counsel* on a mere "suspicion" of impropriety (although petitioner would contend vigorously to the contrary). But the power of the district court to regulate attorneys under the scope of its local rules cannot extend so far as to destroy the right of a member of its bar to *sue in his own right*, absent the most compelling of justifications (cf. *Doe v. A Corp., supra*). No such justifications of any substance appear in the opinions, briefs, or record below.

The wide power of the district courts over attorneys' representation already treads close to the "substantive" limitations contained in the Enabling Act. Abrogation of

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an attorney's *own* property interests cannot be confused with that regulatory power over attorneys with conflicting interests. Petitioner respectfully urges that the Court grant the writ and decide where "regulation" of attorneys' conduct oversteps the bounds of the Act and the permissible discretion of the district court.

C. As a Matter of Law, the District Court Erred in Finding a "Substantial Relationship" Between the Prior Representation and the Instant Case Upon a Mere "Appearance" of Impropriety.

As has been amply demonstrated (Part A. *supra*), the crux of the district court's holding was that petitioner was disqualified because of an "appearance" of impropriety. This goes considerably beyond the present case law on the subject of disqualification of counsel (as developed in the lower courts), and mandates the exercise of this Court's supervisory authority. A conflict of the Circuits has also been raised which only this Court can resolve.

1. The Broad Holdings Below Contain Potentially Disastrous Implications for Attorneys.

The prevailing standard in the lower federal courts when a former client seeks to have an opposing attorney disqualified as counsel is the "substantial relation" test adopted by the district court in the instant case (Appendix, *infra*, p. A19). As this test is usually formulated, a party seeking disqualification of his adversary's attorney need only show that the matters in question in the present case are "substantially related" to the issues in the former representation, whereupon the court will infer that material disclosures to the attorney have occurred. *Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corporation*, 216 F. 2d 920 (2d Cir. 1954); *United States v.*

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Standard Oil Company, 136 F. Supp. 345 (S. D. N. Y. 1955); *T. C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S. D. N. Y. 1953); *Fleisher v. A. A. P., Inc.*, 163 F. Supp. 548 (S. D. N. Y. 1958), *appeal dismissed*, 264 F. 2d 515 (2nd Cir. 1959); *cert. denied*, 359 U. S. 1002 (1959).

An important corollary to the "substantial relation" test is the doctrine that disclosures which taint an attorney's representation so as to mandate his disqualification are *imputed* to his partners, disqualifying them also. See *United States v. Standard Oil Company, supra*, 136 F. Supp. 345, 360. This "partnership imputation" principle has also been held to include salaried associates of the firm which formerly represented the objecting client. *Consolidated Theatres Inc. v. Warner Bros. Circuit Management Corp., supra.*

In light of the opinions below, the implications of these two doctrines are quite alarming for lawyers. One hundred to two hundred member law firms with a multitude of important clients are no longer uncommon. The plain meaning of the holdings below is that attorneys can be disqualified upon a mere hint or suspicion of impropriety, or even in order to avoid the "appearance" of impropriety. This apparently binds the Third Circuit and portends serious potential consequences which are nationwide in extent. The judgment below, if left uncorrected, is likely to be touted as a "leading" case in the area of attorney disqualification, for it far exceeds the scope and tenor of every other decision in the field. The doctrine of "partnership imputation" multiplies these consequences enormously. If a mere suit against a former client of a former law firm, without more, can yield an inference of impropriety which suffices to disqualify, a Pandora's Box of monumental proportions has been opened by this litigation.

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A further twist is that some of the authorities apparently imply that the presumption of disclosures is *irrefutable* by the challenged attorney. See district court discussion of *Fleisher v. A. A. P., Inc., supra;* Appendix, *infra,* p. A16.

The grievousness of the result below is not confined merely to raising the spectre of disqualification in innumerable cases where it would not have existed before. It must be recalled that petitioner's *own action* was dismissed. If a suit against a former client in one's own right yields an inference of impropriety, the outcome below may foreshadow a considerable diminution of the rights of attorneys generally. This handicap would accrue to the benefit of the largest corporations, who are likely to have the most widespread dealings with law firms and hence the most fertile field for seeking disqualification in subsequent suits where they are parties litigant. Further, probable candidates for disqualification may include skilled specialists who gained their expertise while working for larger law firms and representing dominant corporations.[11] The ramifications of a dismissal on the merits for a mere "appearance" of impropriety are incalculable.

2. The Circuits Are Now in Conflict on the Applicable Standard for Disqualification of Attorneys.

As related above, the prevailing doctrine concerning attorney disqualification from representing conflicting interests is the "substantial relation" test, which the district court purported to adopt below. However, in one

11. Even the more narrowly circumscribed "substantial relation" test as adumbrated in the leading cases has been criticized on these grounds. See *Note, Disqualification of Attorneys for Representing Interests Adverse to Former Clients,* 64 Yale Law Journal, 917, 928. Mr. Richardson is a specialist in securities law analogous to the antitrust specialists adverted to in that *Note.*

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crucial aspect, the court *de facto* rejected that doctrine and promulgated another in its stead, producing a conflict of the Circuits on this question.

As usually stated, the "substantial relation" test thrusts the burden on the *party seeking disqualification* to come forward with evidence to show that the matters involved in the prior and present representations are "substantially related." See, e.g., *T. C. Theatre Corp. v. Warner Bros. Pictures, supra.*[12] The district court, in disqualifying petitioner because of an "appearance" of impropriety, clearly thrust the burden of proof back upon him to show no relation between the matters. This conclusion is buttressed by the equivocal language of the district court opinion:

> "Mr. Richardson was privy to matter surrounding the S. E. C. investigation. Certain confidences *may* have been reposed in Mr. Richardson . . . that would be material and relevant to the present litigation. . . . *If, in fact,* such is the case, then the matters are substantially related and plaintiff *could* be disqualified." (Appendix, *infra,* p. A19) [Emphasis added.]

Leaving aside the factual question of whether or not petitioner *carried* this unwarranted burden (on this record, it is apparent he did), the shifting of the burden of proof is in conflict with the authorities in other circuits, particularly the Second Circuit, which hold that the showing of a "substantial relation" is the *defendant's* burden. (See cases cited *supra,* pp. 28-29). It also conflicts with the prevailing view in the Fifth Circuit. There, in *Uniweld Products, Inc. v. Union Carbide,* 385 F. 2d 992 (5th Cir. 1967), *cert. denied,* 390 U. S. 921 (1968), the court held that the burden was on

12. Petitioner's affidavit and the amended complaint showed a *prima facie* lack of relation between the two suits. In oral argument in the court of appeals, counsel for respondents even *conceded* the absence of a substantial relationship in urging a different test upon the court [COA Trans. pp. 21-22].

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the party seeking disqualification to show a nexus between the former and the present representations:

> "It is perfectly plain that the previous representations had, to all practical purposes, completely terminated, as was found by the trial court. This appears to have been fully recognized by all parties to the then pending matters. Although the appellants contend that in the alleged trademark infringement and unfair competition suit, there may be some similar questions that arose in the patent infringement case, *they completely failed to show similarity.* Also, while they charge that the law firm may have obtained information in prior representation that could be utilized in the present litigation, there was an *utter lack of proof* of any such knowledge or information." [385 F. 2d 992, 994-995; emphasis added.]

Apparently, the court of appeals below did not accept the governing standard of the Fifth and Second Circuits as controlling:

> "The plaintiff contends that it is incumbent on the defendants to come forward with evidence to demonstrate that the previous representation is related to the present representation. The rule, however, is clear that the defendants need not show by direct evidence that Mr. Richardson acquired information in the course of the previous litigation which is to be used in the pending action. They only need to show that Mr. Richardson might have acquired substantially related material." (Appendix, *infra,* p. A4)

"Obtaining information" can perhaps be presumed, but of course is not tantamount to showing a substantial relation between the litigations. The Third Circuit's

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curious contradiction of the prevailing standard by way of a non sequitur may be attributable more to lack of understanding than anything else.

The district judge paid lip service to the standard (Appendix, *infra,* pp. A15-A19), but his holding that an "appearance" of impropriety was controlling also seems to bely any comprehension of it.

The conflict between the Circuits is plain. Even in the absence of the other critical questions posed by this petition, the writ should issue so that the prevailing standard can be restored and properly circumscribed to bar only subsequent adverse representations which are substantially related, with the burden of proof properly upon the defendant raising the conflict. Any distant possibility of ancillary confidential disclosures can easily be protected against via the attorney-client privilege.

D. Petitioner's Due Process Rights Have Been Invaded.

Congress, recognizing the important limitations on the power of federal courts which inhere in constitutional guarantees of substantive due process, codified many of these strictures by providing that rules promulgated under the Enabling Act shall not trench upon substantive rights. Hence, many of the distinctions between attorney *representation* and an *attorney-litigant* sketched in Part B, *supra,* are relevant to petitioner's substantive due process claim. There is an inherent symbiosis between the constitutional guarantee and the "procedural" confines of the Enabling Act.

Thus, in *Cord v. Smith,* 338 F. 2d 516 (9 Cir. 1964), a case relied upon below by respondents, the Ninth Circuit reaffirmed the inherent authority of the federal courts to promulgate rules of conduct for attorneys. Federal, not state, rules on attorney disqualification were held to govern a diversity suit in federal court. The court thus recognized

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that federal courts retain the inherent right to govern the conduct of attorneys practicing before them, irrespective of the *Erie*[13] rule, which was held inapplicable to attorney *representation.*

The result in *Cord v. Smith, supra,* highlights the critical distinction between the normal run of attorney disqualification cases and the instant case, and necessitates the invocation of substantive due process. Petitioner does not submit that the Due Process Clause bars the federal courts from taking appropriate action respecting disqualification of an attorney where he seeks to represent conflicting interests in matters substantially related to his prior representation. Nor does petitioner dispute that the inherent federal court power of supervision may extend to outright disqualification of an attorney as a nominal party plaintiff, again in *appropriate* cases. Certainly the "sham" or "bad faith" situation presented in *Doe v. A Corp, supra,* could fall within the ambit of such disqualifications.[14] Perhaps there are some other cases where members of a class similarly situated could adequately protect the rights of attorney-litigants.

But we are not here presented with a question of that sort. Not even the flimsiest of relationships has been drawn between petitioner's earlier representation of respondents and the present suit. Yet, he has been dismissed on the merits as a party plaintiff. Presumably the bar to suit extends even to denial of a pro rata share in any forthcoming class recovery for the stock watering scheme alleged in the complaint. An attorney has been compelled to forfeit his property merely to avoid an "appearance" of impropriety. In this situation, it is submitted that a deprivation of the right to sue and recover on a cause of action allowed other

13. *Erie R. R. v. Tompkins,* 304 U. S. 64 (1938).

14. In this connection, we note that the court of appeals unquestioningly credited petitioner's "good faith." Appendix, *infra,* at p. A5.

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common shareholders is a basic and fundamental loss which cannot be countenanced in the light of applicable principles of substantive due process. Cf. *Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.*, excerpted, *supra*, p. 24. Discovery of the respondents' fraudulent plot was attributable to petitioner's expertise as a securities lawyer, for which he is now being barred from suit. Hence, the invidious denial of his rights also has soundings in Equal Protection as the latter is incorporated in Fifth Amendment Due Process. Cf. *Bolling v. Sharpe*, 347 U. S. 497, 74 S. Ct. 693 (1954). Where the *right to sue* as opposed to the *right to represent* is involved, constitutional doctrine and policy mandate that a far more stringent standard be constructed before the doors of the federal courts are closed to litigants, despite their careers as attorneys.

Finally, an unwarranted cloud of ethical impropriety has been cast over petitioner's activities as a securities lawyer. Petitioner's counsel in the proceedings below vociferously objected to this defamation, contending that it should be effectuated, if at all, with the procedural safeguards of a disciplinary hearing (D. C. Trans. pp. 51-52; COA Trans. p. 30). Petitioner has a valid due process interest in his reputation. Any assault on his professional integrity should be frontal, accompanied by adequate safeguards. Surely, a mere "appearance" of impropriety would be insufficient in such a proceeding.

E. The Result Below Has Significance Far Beyond the Confines of the Present Case.

This case presents an issue of some moment for the nationwide system of federal courts. The Third Circuit decision, if widely followed, may open the door to wholesale disqualification of attorney-litigants in perfectly valid causes of action. There may be public as well as private

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interests involved in such cases. Petitioner can discern no intent in either the federal or state courts, nor in the respective legislatures, to so grievously penalize the practice of law.

The immense potential scope of this decision is best portrayed by pointing out the wide applicability of the Code of Professional Responsibility (and its predecessor, the Canons of Professional Ethics), in the federal courts. In excess of thirty federal district courts *explicitly adopt* either the Code or the Canons (or both), and most provide that these should apply as modified in the future.[15] Where adoption is not provided in terms, it can usually be inferred from the local court's intent to adopt the prevailing ethical norms of the profession.[16]

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15. These include: Eastern District of Pennsylvania (Rule 11); District of Nebraska [Rule 5(b)]; District of New Hampshire [Rule 4(d)]; District of New Jersey (Rule 6); Southern and Eastern Districts of New York [Rule 5(f)]; Eastern District of North Carolina [Rule 1(J)]; Middle District of North Carolina [Rule 2(f)(1)]; Western District of North Carolina [Rule 1(A)]; Southern District of Ohio (Rule); Western District of Oklahoma [Rule 4(j)]; Eastern District of Tennessee (Rule 3); Western District of Tennessee [Rule 1(c)]; Eastern and Western Districts of Arkansas [Rule 1(g)]; District of Connecticut [Rule 2(f)]; District of Columbia [Rules 93(1)(b)(6)(e) and 94(1)(c)]; Southern District of Florida [Rule 17(E)(4)]; Middle District of Florida [Rule 3(E)(4)]; District of Hawaii [Rule 1(g)]; Northern District of Illinois (Rule 8); Southern District of Indiana [Rule 1(f)]; District of Kansas [Rule 3(h)]; Western District of Kentucky [Rule 4(e)]; Middle District of Louisiana [Rule 1(F)(3)]; Western District of Louisiana [Rule 1(g)]; District of Maine [Rule 3(e)]; Eastern District of Michigan [Rule VI(b)(4)]; Western District of Michigan [Rule 4(g)]; District of Minnesota [Rule 1(c)]; District of Montana [Rule 1(f)].

16. See e.g. District of North Dakota; Northern District of Ohio; Eastern District of Wisconsin; Western District of Wisconsin; Eastern District of Illinois; Southern District of Illinois—("recognized standards of ethics of the profession"). Some courts explicitly adopt the wording of the applicable canon, here "I will maintain the confidence and preserve inviolate the secrets of my client." See e.g. District of New Mexico, Northern District of Iowa, Southern District of Iowa, District of Maryland, Western District of Missouri.

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Further, as of August, 1972, forty-three of the fifty states had explicitly adopted the Code for their respective state bars. American Bar Association, *Report of the Special Committee to Secure Adoption of the Code of Professional Responsibility* (*"Report"*), August 1972, page 2. In four states the Code was approved by the state bar association and had been transmitted to the state supreme court with a recommendation for adoption. *Report,* page 3. In only three states had there been no official action. Good standing with the state bar to which an attorney belongs is a *uniform* requirement for admission to the bars of federal district courts.

Thus, in nearly every federal district court, the Code is either directly or indirectly applicable to proceedings before it. If lawyers can be disqualified on the *merits* for relationships as nebulous as those found by the district court below, attorneys' lawsuits may be routinely contestable on grounds totally unrelated to the litigation at hand. The doctrine of "imputation," wherein the knowledge of one lawyer is imputed to his partners and associates, multiplies the avenues for dispute.

In the larger law firms, it is not unlikely that one of the lawyers might have a valid claim against a large corporation or individual client with wide business interests for whom the firm has performed legal services in the past. The reasoning below, if permitted to stand, could quite logically lead to lengthy and protracted hearings on the preliminary issue of "disqualification" before the case ever proceeds to the merits.

The typical litigant can easily avoid this quandary by retaining different counsel. But an attorney-litigant's alternatives are far more circumscribed. Merely to establish his competence to maintain the suit in his own right, he must demonstratively show that he is so far removed from

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the "taint" of former representation that he is above any "inference" of impropriety. The potential ramifications of this disastrous result are an affront to common sense and sound policy.

Finally, widespread attempts to disqualify opposing attorney-litigants may be undertaken for reasons other than hindrance or delay. Indeed, what has occurred below can only be characterized as a blatant attempt to conceal a potential embarrassment under the rubric of "Professional Ethics." In the process, a respected member of the Bar has had his name and reputation besmirched and a perfectly valid cause of action quashed. Concededly, it may be uncomfortable for a large, established, and prestigious law firm to be confronted with a former associate suing a former client. Nevertheless, embarrassment is not a valid reason for suppression of private rights in the federal courts.

CONCLUSION.

In this light, petitioner respectfully urges that the Court grant the writ and weigh the deep and compelling constitutional and policy differences between a disqualification which goes to representation and a dismissal which entirely defeats a valid and meritorious lawsuit.

Respectfully submitted,

DAVID BERGER,
H. LADDIE MONTAGUE, JR.,
DAVID BERGER, P. A.,
Counsel for Petitioner.

Of Counsel:
DAVID BERGER, P. A.,
Attorneys-at-Law.

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Appendix.

OPINION OF THE COURT OF APPEALS.

[Caption omitted]

(Filed November 17, 1972)

VAN DUSEN, *Circuit Judge.*

This is an appeal from an opinion and order of November 3, 1971,[1] disqualifying the plaintiff, Mr. James M. Richardson, from maintaining a class action and shareholders' derivative suit against Alexander Hamilton Life Insurance Company of America (hereafter Hamilton Life), its directors, certain of its officers,[2] and its parent company, Hamilton International Corporation (hereafter Hamilton International).[3]

Mr. Richardson's complaint asserts that a proxy statement, dated May 19, 1969, proposing a merger between

1. The lower court opinion is reported at 333 F. Supp. 1049 (E. D. Pa. 1971). The first sentence of the November 3, 1971, order challenged by the appeal provides:

> ". . . the motion of Hamilton International Corporation, Hamilton Life Insurance Company of America and individually named defendant officers and directors of those companies to disqualify plaintiff, Mr. James M. Richardson, is GRANTED."

A motion to dismiss this appeal for lack of jurisdiction was denied by another panel of this court by order of February 10, 1972. See *Greene v. Singer Co.*, Order of 11/2/71 (3d Cir. No. 71-1835); *cf. Hackett v. General Host Corp.*, 455 F. 2d 618, 624-25 (3d Cir. 1972).

2. The complaint lists the following defendants, who are directors or officers in Hamilton Life or Hamilton International: Owens, Bruce, Safford, Milby, Gust, Davidson, Hofheins, Kresge, Mange, Schuler and Guenther. Also, Lybrand, Ross Bros. & Montgomery was listed as a defendant. The motion of Lybrand, Ross Bros. & Montgomery (an accounting firm) to disqualify plaintiff was denied by the November 3, 1971, order.

3. Mr. Richardson first purchased shares in Hamilton Life in 1964 after he started to represent that company. At the time he filed his complaint, he owned 1100 shares.

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Hamilton Life and Hamilton International was false, misleading, and failed to disclose certain material facts in violation of 15 U. S. C. §§ 78j(b) and 78n, and Rule 10(b)-5 and Regulation 14a issued thereunder.

The defendants claim that former Canons 6 and 37 of the Professional Ethics of the American Bar Association, now embodied in Canon 4 of the new CODE OF PROFESSIONAL RESPONSIBILITY,[4] and Rule 11 of the Local Rules of the United States District Court for the Eastern District of Pennsylvania[5] require Mr. Richardson's disqualification as a party plaintiff.

The defendants, in support of their motion, note that Mr. Richardson, while an associate with the law firm of Schnader, Harrison, Segal and Lewis, performed extensive and detailed legal work for Hamilton Life. The record

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4. The CODE OF PROFESSIONAL RESPONSIBILITY was adopted by the House of Delegates of the American Bar Association on August 12, 1969, to become effective for American Bar Association members on January 1, 1970.

The Ethical Considerations of Canon 4 provide, inter alia:

> "Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. . . . The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.
>
> . . .
>
> "A lawyer should not use information acquired in the course of representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. . . .
>
> "The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment. . . ."

5. Rule 11 states that "the canons of ethics of the American Bar Association as now existing shall be and as hereafter modified shall become standards of conduct for attorneys of this Court."

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shows that his services commenced in September 1964, when the firm was retained as special counsel for Hamilton Life. At that time, the SEC was investigating whether Hamilton Life had violated the federal securities laws during an intrastate offering in Michigan. Mr. Richardson traveled to Michigan on a number of occasions to visit the Hamilton Life offices, and to conduct detailed investigations into the files of Hamilton Life, and into the personal files of its officers and directors. During these visits the plaintiff also conducted interviews with a number of the officers and directors, who are now defendants in the present action.[6] He also reviewed stock subscription agreements and prepared memoranda for registration statements filed by Hamilton Life with the SEC.

During June of 1965, Mr. Richardson devoted a considerable amount of time preparing Messrs. Owens, Bruce and Safford for an SEC hearing in Washington, D. C. The preparation included the discussion of strategy with those officers and other attorneys in the Schnader firm.[7]

In October of 1965 the SEC issued "An Order for Public proceedings and Notice of Hearing Pursuant to Sections 15(B), 15(A) and 19(A) of the Securities and Exchange Act of 1934." Upon receipt of the order, Mr. Richardson drafted a memorandum evaluating it and suggesting possible defenses. In November of that year, responsibility for the defense of Hamilton Life and its officials shifted to counsel in Chicago.[8]

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6. The officials interviewed included Owens, Bruce, Safford, Davidson, Gust and Milby.

7. Paragraph 34(a)iii of the complaint alleged that the proxy statement was false and misleading, because it failed to set forth "the fact that individual defendants had caused Hamilton Life to pay about $100,000 in attorney's fees for the benefit of defendants Owens, Bruce and Safford. . . ." Those fees were for work done during the SEC hearing.

8. The Controller for Schnader, Harrison, Segal and Lewis revealed that Mr. Richardson spent 669.1 hours between September 1964 and June 1966 on the representation of Hamilton Life.

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The rationale underlying Canon 4 is the principle that a client should be encouraged to reveal to his attorney all possibly pertinent information. See Canon 4 of the CODE OF PROFESSIONAL RESPONSIBILITY, Notes 1 and 2. A client should not fear that confidences conveyed to his attorney in one action will return to haunt him in a later one. It is readily apparent that if an attorney is permitted to reveal confidences "the free flow of information from client to attorney, so vital to our system of justice will be irreparably damaged." *United States v. Standard Oil Company,* 136 F. Supp. 345, 355 (S. D. N. Y. 1955); see ABA, INFORMAL OPINION No. 287 (1953).

Therefore, the courts, in order to protect the communications between attorney and client, have generally disqualified an attorney whenever the subject matter of the second representation is "so closely connected with the subject matter of the earlier representation that confidences *might* be involved." ABA, INFORMAL OPINION No. 1233 (Aug. 24, 1972).[9]

The plaintiff contends that it is incumbent on the defendants to come forward with evidence to demonstrate that the previous representation is related to the present representation. The rule, however, is clear that the defendants need not show by direct evidence that Mr. Richardson acquired information in the course of the previous litigation which is to be used in the pending action. They only need to show that Mr. Richardson might have acquired substantially related material. *T. C. Theatre Corp. v. Warner Bros. Pictures, supra.*[10] This position was well stated by Judge Weinfield in that decision as follows:

9. See, *e.g., T. C. Theatre Corp. v. Warner Bros. Pictures,* 113 F. Supp. 266 (S. D. N. Y. 1953); *Consolidated Theatres, Inc. v. Warner Bros.,* 216 F. 2d 920 (2d Cir. 1954); and Annotation, 52 A. L. R. 2d 1243.

10. See cases cited in note 9 *supra.*

> "In cases of this sort the Court must ask whether it can reasonably be said that in the course of the former representation the attorney might have acquired information related to the subject matter of his subsequent representation." *Id.* at 269.

Mr. Richardson spent a considerable amount of time interviewing officers and directors, who are presently defendants, and examining their personal files, as well as the files of Hamilton Life. Although the exact nature of the information he received is unknown, it is known that he had access to confidential information about Hamilton Life's finances, corporate structure and operations, which he would not have received had he not been its attorney. We believe that the district court was justified in concluding that the information Mr. Richardson received in the prior SEC action might be related to the subject matter of his subsequent representation.

While we do not doubt that Mr. Richardson acted in good faith and had the best interests of his class at heart when he brought this suit, we do not believe that he should be permitted to place himself in a position where, even unconsciously, he will be tempted, or it appears to the public and his former clients that he might be tempted, in the interests of his new client, to take advantage of information derived from confidences placed in him by Hamilton Life and its officials. See *Estates Theatres, Inc. v. Columbia Pictures Industries, Inc.*, 5 CCH Trade Reg. Rep. ¶ 74,106, at 92,620 (S. D. N. Y. July 17, 1972); *T. C. Theatre Corp., supra; cf. Fleisher v. A. A. P., Inc.*, 163 F. Supp. 548 (S. D. N. Y. 1958). We note that Mr. Richardson is not the only member of the class available to maintain an action such as this, and the district court order does not preclude an action by others based on the subject matter of this suit.

Whenever an allegation is made that an attorney has violated his moral and ethical responsibility, an important

question of professional ethics is raised. It is the duty of the district court to examine the charge, since it is that court which is authorized to supervise the conduct of the members of its bar.[11] The courts, as well as the bar, have a responsibility to maintain public confidence in the legal profession. This means that a court may disqualify an attorney for not only acting improperly but also for failing to avoid the appearance of impropriety.[12]

We have held that the regulation of attorneys appearing before the district court in these matters will be disturbed only when, on review of the record, we can say that the district court abused its permissible discretion.[13] *Greene v. Singer,* 461 F. 2d 242 (3d Cir. 1972); *cert. denied,* 41 U. S. L. W. 3168 (U. S., Oct. 10, 1972).

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11. See *E. F. Hutton v. Brown,* 305 F. Supp. 371, 378 (S. D. Tex. 1969).

12. The United States District Court for the Eastern District of Pennsylvania has adopted by Rule 11 the ABA CODE OF PROFESSIONAL RESPONSIBILITY as containing proper standards of professional conduct for the members of its bar. Other courts have reached the same conclusion. See *Estates Theatres, Inc. v. Columbia Pictures Industries, Inc., supra; E. F. Hutton & Co. v. Brown, supra* at 377 n. 7, and cases cited therein.

Canon 9 provides that a lawyer should avoid even the appearance of professional impropriety. The Ethical Considerations under that Canon provide, inter alia:

> ". . . A lawyer should promote public confidence in our system and in the legal profession.
> "Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical.
>
> . . .
>
> "Every lawyer owes a solemn duty . . . to strive to avoid not only professional impropriety but also the appearance of impropriety."

13. In this case, the court properly considered such factors as (333 F. Supp. at 1050 and 1055):

> "Different and possibly conflicting policies of the law become apparent. On one hand SEC regulations are designed to protect shareholders of a corporation from wrongdoing and bad faith dealing with the 'insiders' of the corporation. Mr.

On this record the district court has not exceeded the bounds of its permissible discretion,[14] and the above-mentioned November 3, 1971, order (see note 1 *supra*) will be affirmed.

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13. (Cont'd.)

Richardson is a shareholder and is, along with all other shareholders, entitled to that protection. On the other hand, the law seeks to protect attorney-client confidences. If the facts presented compel the conclusion that the attorney-client privilege exists as to these defendants, then the divergent policies of the law must be resolved, and, if possible, harmoniously reconciled.

. . .

"We come face to face now with the conflicting policies of the law, i.e., to protect shareholders and to protect the confidences of former clients. No amount of legal reasoning can completely harmonize this conflict. There are substantial arguments on both sides; it appears to be a question of priorities.

"In a suit of this nature there are other shareholders who are able to bring this suit for the benefit of all shareholders. The sacrosanct nature of the attorney-client privilege dictates that an attorney not disclose the confidences of his client no matter how heinous they may be.

"Mr. Richardson became a shareholder of Hamilton Life during the time that he was representing that company. I point this out not to infer that this was improper, but only to show that it may hint of some impropriety, and it is this suggestion of impropriety that I feel must be avoided."

14. The plaintiff urges that *Greene v. Singer, supra,* controls the outcome of this case. However, the factual basis of *Greene* is significantly different from the record presented in this case. Under the agreement between Greene and the Friden Company (later acquired by Singer), Greene undertook to develop devices that could be used by Friden in its manufacturing and Friden undertook to prosecute any patent applications on such devices through its patent attorney. Milliken was designated by Friden to act as such patent attorney for Greene. He was authorized and directed to receive disclosures and file any applications for patents. See paragraphs 8 and 9 of findings of fact in *Greene v. Singer,* Civil No. 1467 (D. N. J. 1971), as well as language of that opinion reproduced at 288a of Appendix in 3d Cir. No. 71-1835 (see, also, pars. 9, 10, 11, 14, 17 & 23 of Wilcox affidavit of April 12, 1971—146a-153a of above Appendix—and par. 5 of Wilcox affidavit of May 4, 1971, at 252a of such Appendix).

JUDGMENT OF THE COURT OF APPEALS.

[Caption omitted.]

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed November 3, 1971, be, and the same is hereby affirmed, with costs taxed against appellant.

ATTEST:

THOMAS F. QUINN,

Clerk.

November 17, 1972

Costs taxed in favor of appellees as follows:
Brief for appellees — $824.98.

Certified as a true copy and issued in lieu of a formal mandate on December 19, 1972.

Test:

M. ELIZABETH FERGUSON,
Chief Deputy Clerk,
United States Court of Appeals
for the Third Circuit.

ORDER DENYING REHEARING AND REHEARING IN BANC OF THE COURT OF APPEALS.

[Caption omitted.]

Present: SEITZ, *Chief Judge,* and STALEY, VAN DUSEN, ALDISERT, GIBBONS, ROSENN and HUNTER, *Circuit Judges.*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

FRANCIS L. VAN DUSEN,
Judge.

Dated: December 11, 1972.

MEMORANDUM OPINION AND ORDER OF DISTRICT COURT GRANTING RESPONDENTS' MOTION TO DISMISS.

VANARTSDALEN, *J.* November 3, 1971

Defendants, HAMILTON INTERNATIONAL CORPORATION (hereinafter Hamilton), HAMILTON LIFE INSURANCE COMPANY OF AMERICA (hereinafter Hamilton Life), the individually named defendant officers and directors of Hamilton and Hamilton Life, and LYBRAND, ROSS BROTHERS AND MONTGOMERY (hereinafter Lybrand), have moved to disqualify the plaintiff on the ground that Mr. Richardson did extensive legal work for Hamilton Life when he was an associate in the law firm of Schnader, Harrison, Segal & Lewis (hereinafter Schnader firm), which firm formerly represented Hamilton Life and is now representing Hamilton, Hamilton Life, and the individual officers and directors. Lybrand, although not previously represented by Mr. Richardson or the Schnader firm joins in this motion and likewise seeks disqualification as to them.

Mr. Richardson was a shareholder in Hamilton Life and is now a shareholder in Hamilton. He brings this action as a shareholder and derivatively on behalf of Hamilton Life and alleges that Hamilton, its officers and directors, issued and caused to be issued certain allegedly false and misleading proxy statements in connection with the merger of Hamilton Life and Hamilton in 1969 wherein Hamilton became the surviving corporation. It is alleged that as a result of the merger, Hamilton and its officers and directors received excessive amounts of stock in Hamilton to the detriment of the shareholders of Hamilton Life. The claim against Lybrand stems from the fact that they certified the financial statement in the aforementioned proxy statement. Although I have found no case law on the point, I feel that

for the purposes of this motion, the allegation of the complaint should be assumed to be true as with a motion for summary judgment. The allegations contained in the motion, together with attached affidavits, are not controverted by pleadings or counter affidavits, so that they will be treated as facts for purposes of this motion.

Different and possibly conflicting policies of the law become apparent. On one hand SEC regulations are designed to protect shareholders of a corporation from wrongdoing and bad faith dealing with the "insiders" of the corporation. Mr. Richardson is a shareholder and is, along with all other shareholders, entitled to that protection. On the other hand, the law seeks to protect attorney-client confidences. If the facts presented compel the conclusion that the attorney-client privilege exists as to these defendants, then the divergent policies of the law must be resolved, and, if possible, harmoniously reconciled.

The operative facts as to the present motion are not seriously disputed. Naturally both sides argue that these facts compel opposite conclusions. Both parties disagree as to the standard to be applied. However, both sides argue that no matter what standard is applied, their respective conclusions are compelled by the facts. I will first enumerate the relevant facts as I find them from the depositions and affidavits which are part of the record. Next I will discuss the applicable standards and apply those standards to the facts.

James M. Richardson, an attorney and member of the Philadelphia Bar, became an associate of the Schnader firm in June of 1955 where he remained until February 1969. Mr. Richardson is presently a partner in the law firm of Pechner, Sacks, Cantor, Dorfman, Rosen & Richardson (hereinafter Pechner firm). The Pechner firm represents Mr. Richardson in the present action. From September

1964 through June 1966, the Schnader firm did legal work for Hamilton Life. Mr. Richardson, as an associate in the Schnader firm, devoted some 669 hours of his time during that period to the affairs of Hamilton Life. Hamilton Life was a client of the Schnader firm during that period and Mr. Richardson was one of the attorneys for Hamilton Life by virtue of his association with the Schnader firm and his work for Hamilton Life. The deposition of Mr. Richardson discloses the nature of the work he did for Hamilton Life.

Mr. Richardson worked with Mr. Meeker, a partner in the Schnader firm, in connection with an intra-state offering of Hamilton Life stock. Mr. Richardson did the "spade" work in this connection. He conducted interviews with the various officers and directors of Hamilton Life (Dep. pp. 10-11). Some of those same persons are named as individual defendants. He reviewed the files of Hamilton Life, and delved into its formation (Hamilton Life was formed sometime in 1963, Dep. p. 13). Mr. Richardson also reviewed stock subscription agreements and prepared memoranda with respect to registration statements filed by Hamilton Life with the SEC (Dep. pp. 26-27). Those registration statements do not involve the presently contested transactions. Mr. Richardson also did work in preparing the individual officers and directors of Hamilton Life for testimony before the SEC in Washington in 1965 and he also attended some of those hearings (Dep. pp. 27-30).

It is fair to assume that the information available to Mr. Richardson through interviews and records was not generally available to the public, and it was given to Mr. Richardson as an attorney (Dep. pp. 42-43). The exact nature of the information, as opposed to the type of work that Mr. Richardson did, is not known to the court. However, the type of work suggests that Mr. Richardson received confidential information about the entire workings

of Hamilton Life up to and through June 1966 and in particular as to its finances, corporate structure and operations. There may be some question as to the exact date when the Schnader firm ceased to represent Hamilton Life. For purposes of this decision, any work done by the Schnader firm for Hamilton Life after the proceedings before the SEC in September of 1965 is of no consequence and will not be considered.

Defendants argue that on these facts, Mr. Richardson gained an "insight" into the operation of Hamilton Life and its officers and directors and as a result of this "insight," obtained while engaged as attorney for Hamilton Life, he should be barred from maintaining this action. Plaintiff argues that the complaint deals with matters in connection with a 1969 merger arising after termination of the attorney-client relationship and that the matters complained of stem only from that merger and are not connected or in any way related to the previous representation of Hamilton Life by the Schnader firm.

No authority need be cited for the proposition that an attorney may not participate in litigation if his participation would violate his ethical duty to a former client. This proposition involves two things: First, the nature of the "ethical duty" to a former client; and second, the facts which would give rise to a possible violation of that duty.

Recognizing that the ethical duty of an attorney to his former client may be defined in various ways, in general it is an absolute duty not to disclose or use any confidence revealed to the attorney by the client that may in any manner be deterimental to the former client. The facts which give rise to the alleged violation necessarily vary with each case. The crux of the problem is that the court rarely knows the nature or details of the confidences and to require them to be disclosed even "in camera" for the purposes of a

motion to disqualify violates the confidential nature of the communications. Faced with this problem, courts have attempted to fashion standards by which they can judge objectively the circumstances under which an attorney must be disqualified because of the danger of violating the confidential relationship.

Where an attorney seeks to represent a party opposing his former client in the same matter, the compelling conclusion is that the ethical duty would be breached, not because the confidences of the former client would necessarily be used, but because of the likelihood that they could be used, *e.g., United States v. Standard Oil Company,* 136 F. Supp. 345 (S. D. N. Y. 1955). What the courts are saying is that when an attorney represents a client, the court will presume the existence of confidences in connection with that representation.

Where an attorney seeks to represent a party opposing his former client in a different and separate matter from that in which the attorney represented his former client, the courts have looked to the relation between the present matter and the former matter to determine whether confidences which may have been revealed might be used to the detriment of the former client. Again, the courts presume that confidences have been revealed. The attempt to define the relation between the present and former matter is an attempt to determine whether those former confidences could be used to the detriment of the former client in the present matter (Also the attempt to define the relation between the present and former matter is an attempt to determine what confidences may be presumed from former representation).

Having set forth my understanding of the reasons behind the standard, it is appropriate to determine the nature of that standard.

Our starting point is the Canon of Ethics, specifically Canons 6 and 37. They provide in pertinent part as follows:

"6. *Adverse Influences and Conflicting Interests.*

"The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

"37. *Confidences of a Client.*

"It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client."

The court's jurisdiction to enforce these canons is based on its regulatory power over the members of its bar.

The oft quoted case, *T. C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S. D. N. Y. 1953), provides the insight to the standards here applicable.

". . . the former client needs show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or causes of

> action wherein the attorney previously represented him, the former client . . . In cases of this sort the court must ask whether it can be reasonably said that in the course of the former representation the attorney might have acquired information related to the subject of his subsequent representation. If so, then the relationship between the two matters is sufficiently close to bring the latter representation within the prohibition of Canon 6." *T. C. Theatre* case, *supra*, pp. 268-269.

In the case of *Fleisher v. A. A. P., Inc.*, 163 F. Supp. 548 (S. D. N. Y. 1958), appeal dismissed, 264 F. 2d 515 (2nd Cir. 1959), *cert. denied*, 359 U. S. 1002 (1959), District Judge Herlands carefully analyzed the controlling principles of law with respect to the disqualification issue. In the *Fleisher* case he noted the aforementioned quote from *T. C. Theatre* case, *supra*, and pointed out that on appeal in that case the circuit court said inter alia that the aforementioned quote went to the quantum of proof. *Consolidated Theatres v. Warner Bros. Circuit Management Corporation*, 216 F. 2d 920, p. 924 (2nd Cir. 1954). Judge Herlands goes on to say:

> "The courts have generally treated this so-called rule of evidence as creating an 'irrebuttable inference' that confidential information, material and relevant to the instant case, was given to the attorney if the issue and the subject matter of the former case are substantially related to the issues and subject-matter of the present litigation.
>
> * * *
>
> "The stated rule does not shift a burden of disproof upon the attorney sought to be disqualified by his former client. On the contrary, the former client must show that there is a 'substantial relationship' between

the issues in the present case and the subject-matter of the former representation. Nevertheless, should the question be close, it should be resolved in favor of the client. As Judge Irving R. Kaufman said in United States v. Standard Oil Company, supra, 138 F. Supp. at page 364:

> " 'I agree, that where there is a close question as to whether particular confidences of the former client will be pertinent to the instant case, an attorney should be disqualified to avoid the appearance if not the actuality of evil.' " *Fleisher* at 552-553.

Defendants urge that the case of *Chugach Electrical Association v. United States District Court for the District of Alaska at Anchorage,* 370 F. 2d 441 (9th Cir. 1966), compels a different test or standard to be applied. Citing the following language they contend that if the former representation gives the attorney an insight or understanding of subsequent events he may be disqualified from representing the adversary of this former client.

> "[3, 4] A likelihood here exists which cannot be disregarded that Mr. Boyko's knowledge of private matters gained in confidence would provide him with greater insight and understanding of the significance of subsequent events in an antitrust context and offer a promising source of discovery. This likelihood is enhanced by recognition of the fact that the allegations of a complaint are not always an accurate appraisal of the relevant period of time in antitrust cases. Discovery and trial proof frequently introduce ramifications rendering earlier events relevant." *Chugach* at 443.

In *Chugach* the attorney sought to be disqualified was the former general counsel for C. E. A. The C. E. A. Board

of Directors changed and Mr. Boyko (former general counsel) resigned. He subsequently represented Malamska Electrical Association in an antitrust action against C. E. A. In ordering disqualification, the circuit court also pointed out:

> "The problem here is not limited to the question whether Mr. Boyko was connected with petitioner as its counsel at the time agreements were reached and overt acts taken,[2] but includes the question whether, as attorney, he was in a position to acquire knowledge casting light on the purpose of later acts and agreements. The policies of the new board majority, pursuant to which the alleged violations occurred, presumably reflected the expressed views and attitudes of the old minority. . . ." (Footnote omitted). *Chugach* at 443.

On the facts in the *Chugach* case, I am not convinced that a new standard is being applied. The court is merely finding that confidences could have been reposed in Mr. Boyko not only because of related subject matter, but by virtue of his position as general counsel, which confidences could be used to the former client's detriment.

Neither Mr. Richardson nor the Schnader firm acted as general counsel for Hamilton Life so that any presumption with respect to confidences disclosed by Hamilton Life or its officers and directors must be made if at all from the relationship of the former representation to the present subject matter of the litigation.

The complaint alleges inter alia that in 1968 the named defendants were controlling shareholders in Hamilton Life and Hamilton. Hamilton was a holding company, its sole asset being Hamilton Life stock. It is alleged that Hamilton caused some 40,000 shares of Hamilton stock to be issued without consideration to shareholders of Hamilton,

those shareholders being the individual defendants. Hamilton Life then caused to be issued a proxy statement which recommended the merger of Hamilton Life with Hamilton without disclosing the facts as to the 40,000 shares previously issued without consideration.

Other allegations are made and they revolve around the 10(b)(5) SEC violation.

The test is whether the issues raised in this complaint are substantially related to the subject matter of the former representation.

Undoubtedly both matters embrace SEC regulations and requirements. This in and of itself may not be enough to require disqualification. However, it does indicate some relationship. The issues raised by the complaint will deal undoubtedly with the stock ownership of the various defendants and their relationship with the corporations involved. Certainly some, if not all, of these questions were raised by the SEC investigation in 1965.

It is conceded that the merger here complained of was not done overnight. It is entirely possible that the plan originated or developed in 1964-1965 and depended on the outcome of the SEC investigation at that time.

Mr. Richardson was privy to matter surrounding the SEC investigation. Certain confidences may have been reposed in Mr. Richardson at the time when he, through the Schnader firm, represented Hamilton Life that would be material and relevant to the present litigation. Defendants allege this is so in effect. If in fact, such is the case, then the matters are substantially related and plaintiff could be disqualified. I feel that it is a close question but to avoid the "appearance of evil" disqualification must be directed.

> "No client should ever be concerned with the possible use against him in future litigation of what he may have revealed to his attorney. Matters disclosed by

clients under the protective seal of the attorney-client relationship and intended in their defense should not be used as weapons of offense. The rule prevents a lawyer from placing himself in an anomalous position. Were he permitted to represent a client whose cause is related and adverse to that of his former client he would be called upon to decide what is confidential and what is not, and, perhaps, unintentionally to make use of confidential information received from the former client while espousing his cause. Lawyers should not put themselves in the position 'where, even unconsciously, they might take, in the interests of a new client, an advantage derived or traceable to, confidences reposed under the cloak of a prior, privileged relationship.' In cases of this sort the Court must ask whether it can reasonably be said that in the course of the former representation the attorney might have acquired information related to the subject of his subsequent representation. If so, then the relationship between the two matters is sufficiently close to bring the later representation within the prohibition of Canon 6. In the instant case I think this can be said." *T. C. Theatre, supra,* at 268-269.

Several questions remain and as previously stated the possible conflict between the policies of law now exist. It is appropriate to note that at no time was it shown that Mr. Richardson represented the accounting firm of Lybrand. Thus, I can see no reason to disqualify Mr. Richardson as to the action against Lybrand. The complaint states a separate cause of action against Lybrand and, as such, Hamilton would not be an indispensable party. Therefore, as to Lybrand, disqualification is not appropriate. If Mr. Richardson should, whether intentionally or otherwise, dur-

ing the course of that litigation reveal an attorney-client confidence reposed in him, such might be cause for separate disciplinary action or possible action for damages by the former client, but it does not go to disqualification.

Does the fact that Mr. Richardson is a shareholder of Hamilton mitigate against disqualification? As a derivative suit, Mr. Richardson seeks to sue on behalf of Hamilton Life for alleged violations of the SEC regulation that the Hamilton Life officers and directors allegedly perpetrated. In my initial discussion, I concluded that Mr. Richardson through the Schnader firm formerly represented the individual officers and directors of Hamilton Life as well as Hamilton Life. Had Mr. Richardson through the Schnader firm represented Hamilton Life alone, it is arguable that his present position would not be inconsistent with the former representation. *Marco v. Dulles,* 169 F. Supp. 622 (S. D. N. Y. 1959), *appeal dismissed,* 268 F. 2d 192 (2nd Cir. 1959). However, since he did represent the individual defendants as well, in what I find to be a substantially related matter, the maintenance of this suit as a derivative action would be a conflict of interest vis-à-vis the individual officers and directors requiring disqualification. The fact that Mr. Richardson is a plaintiff in this action does not mitigate disqualification. If disqualification is appropriate he certainly cannot do through an attorney what he could not do himself. *Norman v. McKee,* 431 F. 2d 769, p. 772 (9th Cir. 1970).

We come face to face now with the conflicting policies of the law, i.e., to protect shareholders and to protect the confidences of former clients. No amount of legal reasoning can completely harmonize this conflict. There are substantial arguments on both sides; it appears to be a question of priorities.

In a suit of this nature there are other shareholders who are able to bring this suit for the benefit of all shareholders. The sacrosanct nature of the attorney-client privilege dictates that an attorney not disclose the confidences of his client no matter how heinous they may be.

Mr. Richardson became a shareholder of Hamilton Life during the time that he was representing that company. I point this out not to infer that this was improper, but only to show that it may hint of some impropriety, and it is this suggestion of impropriety that I feel must be avoided.

For the above stated reasons, I feel that the policy of the law to protect the attorney-client relationship should take precedence over the policy of the law to protect shareholders of a corporation, under the facts of this case.

ORDER.

And Now, this 3rd day of November, 1971, the motion of Hamilton International Corporation, Hamilton Life Insurance Company of America and individually named defendant officers and directors of those companies to disqualify plaintiff, Mr. James M. Richardson, is Granted. The motion of Lybrand, Ross Brothers & Montgomery to disqualify plaintiff, Mr. James M. Richardson, is Denied.

By the Court:

Vanartsdalen, *J.*

CANONS FOUR AND NINE OF THE AMERICAN BAR ASSOCIATION'S CODE OF PROFESSIONAL RESPONSIBILITY

CANON 4

A Lawyer Should Preserve the Confidences and Secrets of a Client

ETHICAL CONSIDERATIONS

EC 4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him.[1] A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volun-

1. *See* ABA Canons 6 and 37 and *ABA Opinion* 287 (1953).

"The reason underlying the rule with respect to confidential communications between attorney and client is well stated in Mechem on Agency, 2d Ed., Vol. 2, § 2297, as follows: 'The purposes and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosures to the attorney of the client's objects, motives and acts. This disclosure is made in the strictest confidence, relying upon the attorney's honor and fidelity. To permit the attorney to reveal to others what is so disclosed, would be not only a gross violation of a sacred trust upon his part, but it would utterly destroy and prevent the usefulness and benefits to be derived from professional assistance. Based upon considerations of public policy, therefore, the law wisely declares that all confidential communications and disclosures, made by a client to his legal adviser for the purpose of obtaining his professional aid or advice, shall be strictly privileged;—that the attorney shall not be permitted, without the consent of his client,—and much less will he be compelled—to reveal or disclose communications made to him under such circumstances.'" *ABA Opinion* 250 (1943).

"While it is true that complete revelation of relevant facts should be encouraged for trial purposes, nevertheless an attorney's dealings with his client, if both are sincere, and if the dealings involve more than mere technical matters, should be immune to discovery proceedings. There must be freedom from fear of revealment of matters disclosed to an attorney because of the peculiarly intimate relationship existing." Ellis-Foster Co. v. Union Carbide & Carbon Corp., 159 F. Supp. 917, 919 (D. N. J. 1958).

Cf. ABA Opinions 314 (1965), 274 (1946) and 268 (1945).

teered by his client.[2] A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

EC 4-2 The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure,[3] when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship.[4] Thus, in the absence of

2. "While it is the great purpose of law to ascertain the truth, there is the countervailing necessity of insuring the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense. This assistance can be made safely and readily available only when the client is free from the consequences of apprehension of disclosure by reason of the subsequent statements of the skilled lawyer. Baird v. Koerner, 279 F. 2d 623, 629-30 (9th Cir. 1960).

Cf. ABA Opinion 150 (1936).

3. "Where . . . [a client] knowingly and after full disclosure participates in a [legal fee] financing plan which requires the furnishing of certain information to the bank, clearly by his conduct he has waived any privilege as to that information." *ABA Opinion* 320 (1968).

4. "The lawyer must decide when he takes a case whether it is a suitable one for him to undertake and after this decision is made, he is not justified in turning against his client by exposing injurious

consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning his clients.

EC 4-3 Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

EC 4-4 The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes.[5] Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates.[6] Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to

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4. (Cont'd.)

evidence entrusted to him. . . . [D]oing something intrinsically regrettable, because the only alternative involves worse consequences, is a necessity in every profession." WILLISTON, LIFE AND LAW 271 (1940).

Cf. ABA Opinions 177 (1938) and 83 (1932).

5. *See* ABA CANON 11.

6. *See* ABA CANON 37.

another,[7] and no employment should be accepted that might require such disclosure.

EC 4-6 The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment.[8] Thus a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets.[9] A lawyer should also provide for the protection of the confidences and secrets of his client following the termination of the practice of the lawyer, whether termination is due to death, disability, or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to him and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.

DISCIPLINARY RULES

DR 4-101 Preservation of Confidences and Secrets of a Client.[10]

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

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7. *See* ABA CANONS 6 and 37.

"[A]n attorney must not accept professional employment against a client or a former client which will, or even *may* require him to use confidential information obtained by the attorney in the course of his professional relations with such client regarding the subject matter of the employment . . . ." *ABA Opinion* 165 (1936).

8. *See* ABA CANON 37.

"Confidential communications between an attorney and his client, made because of the relationship and concerning the subject-matter of the attorney's employment, are generally privileged from disclosure without the consent of the client, and this privilege outlasts the attorney's employment. *Canon 37.*" *ABA Opinion* 154 (1936).

9. *Cf. ABA Opinion* 266 (1945).

10. *See* ABA CANON 37; *cf.* ABA Canon 6.

(B) Except when permitted under DR 4-101 (C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.[11]

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself[12] or of a third person,[13] unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.[14]

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11. "§ 6068 . . . It is the duty of an attorney:

. . . .

"(e) To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client." CAL. BUSINESS AND PROFESSIONS CODE § 6068 (West 1962). Virtually the same provision is found in the Oregon statutes. ORE. REV. STATS. ch. 9 § 9.460(5).

"Communications between lawyer and client are privileged (WIGMORE ON EVIDENCE, 3d Ed., Vol. 8, §§ 2290-2329). The modern theory underlying the privilege is subjective and is to give the client freedom of apprehension in consulting his legal adviser (*ibid.*, § 2290, p. 548). The privilege applies to communications made in seeking legal advice for any purpose (*ibid.*, § 2294, p. 563). The mere circumstance that the advice is given without charge therefor does not nullify the privilege (*ibid.*, § 2303)." ABA Opinion 216 (1941).

"It is the duty of an attorney to maintain the confidence and preserve inviolate the secrets of his client . . . ." *ABA Opinion* 155 (1936).

12. *See* ABA CANON 11.

"The provision respecting employment is in accord with the general rule announced in the adjudicated cases that a lawyer may not make use of knowledge or information acquired by him through his professional relations with his client, or in the conduct of his client's business, to his own advantage or profit (7 C. J. S., § 125, p. 958; Healy v. Gray, 184 Iowa 111, 168 N. W. 222; Baumgardner v. Hudson, D. C. App., 277 F. 552; Goodrum v. Clement, D. C. App., 277 F. 586)." *ABA Opinion* 250 (1943).

13. *See ABA Opinion* 177 (1938).

14. "[A lawyer] may not divulge confidential communications, information, and secrets imparted to him by the client or acquired

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.[15]

14. (Cont'd.)

during their professional relations, unless he is authorized to do so by the client (People v. Gerold, 265 Ill. 448, 107 N. E. 165, 178; Murphy v. Riggs, 238 Mich. 151, 213 N. W. 110, 112; Opinion of this Committee, No. 91)." *ABA Opinion* 202 (1940).

Cf. ABA Opinion 91 (1933).

15. "A defendant in a criminal case when admitted to bail is not only regarded as in the custody of his bail, but he is also in the custody of the law, and admission to bail does not deprive the court of its inherent power to deal with the person of the prisoner. Being in lawful custody, the defendant is guilty of an escape when he gains his liberty before he is delivered in due process of law, and is guilty of a separate offense for which he may be punished. In failing to disclose his client's whereabouts as a fugitive under these circumstances the attorney would not only be aiding his client to escape trial on the charge for which he was indicted, but would likewise be aiding him in evading prosecution for the additional offense of escape.

"It is the opinion of the committee that under such circumstances the attorney's knowledge of his client's whereabouts is not privileged, and that he may be disciplined for failing to disclose that information to the proper authorities. . . ." *ABA Opinion* 155 (1936).

"We held in *Opinion* 155 that a communication by a client to his attorney in respect to the future commission of an unlawful act or to a continuing wrong is not privileged from disclosure. Public policy forbids that the relation of attorney and client should be used to conceal wrongdoing on the part of the client.

. . . .

"When an attorney representing a defendant in a criminal case applies on his behalf for probation or suspension of sentence, he represents to the court, by implication at least, that his client will abide by the terms and conditions of the court's order. When that attorney is later advised of a violation of that order, it is his duty to advise his client of the consequences of his act, and endeavor to prevent a continuance of the wrongdoing. If his client thereafter persists in violating the terms and conditions of his probation, it is the duty of the attorney as an officer of the court to advise the proper authorities concerning his client's conduct. Such information, even though coming to the attorney from the client in the course of his professional relations with respect to other matters in which he represents the defendant, is not privileged from disclosure. . . ." *ABA Opinion* 156 (1936).

(3) The intention of his client to commit a crime[16] and the information necessary to prevent the crime.[17]

(4) Confidences or secrets necessary to establish or collect his fee[18] or to defend himself or his employees or associates against an accusation of wrongful conduct.[19]

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101 (C) through an employee.

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16. *ABA Opinion* 314 (1965) indicates that a lawyer must disclose even the confidences of his clients if "the facts in the attorney's possession indicate beyond reasonable doubt that a crime will be committed."

See ABA Opinion 155 (1936).

17. *See* ABA CANON 37 and *ABA Opinion* 202 (1940).

18. *Cf. ABA Opinion* 250 (1943).

19. *See* ABA CANON 37 and *ABA Opinions* 202 (1940) and 19 (1930).

"[T]he adjudicated cases recognize an exception to the rule [that a lawyer shall not reveal the confidences of his client], where disclosure is necessary to protect the attorney's interests arising out of the relation of attorney and client in which disclosure was made.

"The exception is stated in MECHEM ON AGENCY, 2d Ed., Vol. 2, § 2313, as follows: 'But the attorney may disclose information received from the client when it becomes necessary for his own protection, as if the client should bring an action against the attorney for negligence or misconduct, and it became necessary for the attorney to show what his instructions were, or what was the nature of the duty which the client expected him to perform. So if it became necessary for the attorney to bring an action against the client, the client's privilege could not prevent the attorney from disclosing what was essential as a means of obtaining or defending his own rights.'

"Mr. Jones, in his COMMENTARIES ON EVIDENCE, 2d Ed., Vol. 5, § 2165, states the exception thus: 'It has frequently been held that the rule as to privileged communications does not apply when litigation arises between attorney and client to the extent that their communications are relevant to the issue. In such cases, if the disclosure of privileged communications becomes necessary to protect the attorney's rights, he is released from those obligations of secrecy which the law places upon him. He should not, however, disclose more than is necessary for his own protection. It would be a manifest injustice to allow the client to take advantage of the rule of exclusion as to professional confidence to the prejudice of his attorney, or that it should be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights. In such cases the attorney is exempted from the obligations of secrecy.'" *ABA Opinion* 250 (1943).

CANON 9

A Lawyer Should Avoid Even the Appearance of Professional Impropriety

ETHICAL CONSIDERATIONS

EC 9-1 Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system.[1] A lawyer should promote public confidence in our system and in the legal profession.[2]

EC 9-2 Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client. While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.[3]

EC 9-3 After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior

NOTES

1. "Integrity is the very breath of justice. Confidence in our law, our courts, and in the administration of justice is our supreme interest. No practice must be permitted to prevail which invites towards the administration of justice a doubt or distrust of its integrity." Erwin M. Jennings Co. v. DiGenova, 107 Conn. 491, 499, 141 A. 866, 868 (1928).

2. "A lawyer should never be reluctant or too proud to answer unjustified criticism of his profession, of himself, or of his brother lawyer. He should guard the reputation of his profession and of his brothers as zealously as he guards his own." Rochelle and Payne, *The Struggle for Public Understanding*, 25 Texas B. J. 109, 162 (1962).

3. *See* ABA Canon 29.

to his leaving, since to accept employment would give the appearance of impropriety even if none exists.[4]

EC 9-4 Because the very essence of the legal system is to provide procedures by which matters can be presented in an impartial manner so that they may be decided solely upon the merits, any statement or suggestion by a lawyer that he can or would attempt to circumvent those procedures is detrimental to the legal system and tends to undermine public confidence in it.

EC 9-5 Separation of the funds of a client from those of his lawyer not only serves to protect the client but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided.

EC 9-6 Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.[5]

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4. *See* ABA CANON 36.

5. "As said in Opinion 49, of the Committee on Professional Ethics and Grievances of the American Bar Association, page 134: 'An attorney should not only avoid impropriety but should avoid the appearance of impropriety.'" State ex rel. Nebraska State Bar Ass'n v. Richards, 165 Neb. 80, 93, 84 N. W. 2d 136, 145 (1957).

"It would also be preferable that such contribution [to the campaign of a candidate for judicial office] be made to a campaign committee rather than to the candidate personally. In so doing, possible appearances of impropriety would be reduced to a minimum." *ABA Opinion* 226 (1941).

"The lawyer assumes high duties, and has imposed upon him grave responsibilities. He may be the means of much good or much mischief. Interests of vast magnitude are entrusted to him; confidence is reposed in him; life, liberty, character and property should be protected by him. He should guard, with jealous watchfulness, his own reputation, as well as that of his profession." People ex rel. Cutler v. Ford, 54 Ill. 520, 522 (1870), and also quoted in State Board of Law Examiners v. Sheldon, 43 Wyo. 522, 526, 7 P. 2d 226, 227 (1932).

See ABA Opinion 150 (1936).

DISCIPLINARY RULES

DR 9-101 Avoiding Even the Appearance of Impropriety.[6]

(A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.[7]

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6. *Cf.* CODE OF PROFESSIONAL RESPONSIBILITY, EC 5-6.

7. *See* ABA CANON 36.

"It is the duty of the judge to rule on questions of law and evidence in misdemeanor cases and examinations in felony cases. That duty calls for impartial and uninfluenced judgment, regardless of the effect on those immediately involved or others who may, directly or indirectly, be affected. Discharge of that duty might be greatly interfered with if the judge, in another capacity, were permitted to hold himself out to employment by those who are to be, or who may be, brought to trial in felony cases, even though he did not conduct the examination. His private interests as a lawyer in building up his clientele, his duty as such zealously to espouse the cause of his private clients and to defend against charges of crime brought by law-enforcement agencies of which he is a part, might prevent, or even destroy, that unbiased judicial judgment which is so essential in the administration of justice.

"In our opinion, acceptance of a judgeship with the duties of conducting misdemeanor trials, and examinations in felony cases to determine whether those accused should be bound over for trial in a higher court, ethically bars the judge from acting as attorney for the defendants upon such trial, whether they were examined by him or by some other judge. Such a practice would not only diminish public confidence in the administration of justice in both courts, but would produce serious conflict between the private interests of the judge as a lawyer, and of his clients, and his duties as a judge in adjudicating important phases of criminal processes in other cases. The public and private duties would be incompatible. The prestige of the judicial office would be diverted to private benefit, and the judicial office would be demeaned thereby." *ABA Opinion* 242 (1942).

"A lawyer, who has previously occupied a judicial position or acted in a judicial capacity, should refrain from accepting employment in any matter involving the same facts as were involved in any specific question which he acted upon in a judicial capacity and, for the same reasons, should also refrain from accepting any employment which might reasonably appear to involve the same facts." *ABA Opinion* 49 (1931).

See ABA Opinion 110 (1934).

(B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.[8]

(C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body,[9] or public official.

DR 9-102 Preserving Identity of Funds and Property of a Client.[10]

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state

8. *See ABA Opinions* 135 (1935) and 134 (1935); *cf.* ABA CANON 36 and *ABA Opinions* 39 (1931) and 26 (1930). *But see ABA Opinion* 37 (1931).

9. "[A statement by a governmental department or agency with regard to a lawyer resigning from its staff that includes a laudation of his legal ability] carries implications, probably not founded in fact, that the lawyer's acquaintance and previous relations with the personnel of the administrative agencies of the government place him in an advantageous position in practicing before such agencies. So to imply would not only represent what probably is untrue, but would be highly reprehensible." *ABA Opinion* 184 (1938).

10. *See* ABA CANON 11.

"*Rule 9.* . . . A member of the State Bar shall not commingle the money or other property of a client with his own; and he shall promptly report to the client the receipt by him of all money and other property belonging to such client. Unless the client otherwise directs in writing, he shall promptly deposit his client's funds in a bank or trust company . . . in a bank account separate from his own account and clearly designated as 'Clients' Funds Account' or 'Trust Funds Account' or words of similar import. Unless the client otherwise directs in writing, securities of a client in bearer form shall be kept by the attorney in a safe deposit box at a bank or trust company, . . . which safe deposit box shall be clearly designated as 'Clients' Account' or 'Trust Account' or words of similar import, and be separate from the attorney's own safe deposit box." CAL. BUSINESS AND PROFESSIONS CODE § 6076 (West 1962).

"[C]ommingling is committed when a client's money is intermingled with that of his attorney and its separate identity lost so that it may be used for the attorney's personal expenses or subjected to claims of his creditors. . . . The rule against commingling was adopted to provide against the probability in some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of clients' money." Black v. State Bar, 57 Cal. 2d 219, 225-26, 368 P. 2d 118, 122, 18 Cal. Rptr. 518, 522 (1962).

in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:

(1) Promptly notify a client of the receipt of his funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

EXCERPTS FROM PRELIMINARY PROSPECTUS OF DECEMBER 4, 1970.

(Received by petitioner subsequent to filing of Original Complaint and prior to amending of Complaint.)

Registration No. 2-34900

SECURITIES AND EXCHANGE COMMISSION

Washington, D. C. 20549

AMENDMENT NO. 4

TO

FORM S-1

REGISTRATION STATEMENT

Under
The Securities Act of 1933

Hamilton International Corporation

(Exact name of Registrant as specified in charter)
Village of Quakertown
Farmington, Michigan
(Address of principal executive offices)

Delaware	38-1786123
(State of Incorporation)	(I.R.S. Identification Number)

Received
Dec. 4, 1970

• • •

PRELIMINARY PROSPECTUS DATED DECEMBER 4, 1970

PROSPECTUS

4,360,117 Shares of Common Stock
($1 Par Value)
521,058 Shares of Class C Convertible Common Stock
($0.10 Par Value)

HAMILTON INTERNATIONAL CORPORATION

The securities offered hereby involve a high degree of risk. (See Captions, Introductory Statement and The Business of the Company and Subsidiaries)

PUBLIC OFFERING OF SECURITIES

• • •

Payment of Legal Fees of Officers and Directors in Administrative Proceedings before the Commission

In 1966, 1967 and 1968 Hamilton Life paid the law firm of Pope, Ballard, Uriell, Kennedy, Shepard & Fowle the sum of $91,070 for legal services rendered to E. Keith Owens, Charles H. Bruce and Robert O. Safford, officers and directors of Hamilton Life and International, in connection with defense of the Administrative Proceeding brought against them by the Securities and Exchange Commission mentioned above. The payment was charged to operations. While Hamilton Life was not a party to the proceeding, all of the disinterested members of the Board of the Directors of Hamilton Life (Messrs. Owens, Bruce and Safford, not voting) passed a resolution on June 15, 1966 and a resolution on December 13, 1967 authorizing such payment. The individuals involved informed the Board that the expense of contesting was more than they desired to bear and they were going to discontinue their opposition to the proceeding. The disinterested members of the Board determined it to be in the best interest of Hamilton Life to obtain a deter-

mination on the merits in the proceedings and authorized payment of legal fees to defend the officers named because the matter affected Hamilton Life even though Hamilton Life was not named as a respondent in the proceeding. The payment of legal fees was subject to the condition that the final decision in the pending proceedings exonerate the Messrs. Owens, Safford and Bruce.

Hamilton Life also agreed to the following undertaking specified in Rule 460(a) under the Securities Act of 1933.

> "Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers and controlling persons of the registrant pursuant to the foregoing provisions, or otherwise, the registrant has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the registrant of expenses incurred or paid by a director, officer or controlling person of the registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Act and will be governed by the final adjudication of such issue."

The Messrs. Owens, Safford and Bruce have undertaken, in addition to the condition specified above, to abide by said Rule 460(a).

Pursuant to the undertaking Hamilton Life has submitted to the United States District Court for the Eastern District of Michigan the question of whether the amount of the legal fees paid on behalf of Mr. Owens ($30,353) was against public policy. The action is pending and no date for hearing has been set.

• • •

FILE COPY

FILED
APR 23 1973
MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-1220.

JAMES R. RICHARDSON,
Petitioner,

v.

HAMILTON INTERNATIONAL CORPORATION et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1972.

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BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania (Pet. App. 10-22) is reported at 333 F. Supp. 1049 (E. D. Pa. 1971). The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1-7) is reported at 469 F. 2d 1382 (3d Cir. 1972).

QUESTION PRESENTED.

Was the court of appeals in error in holding that the district court did not exceed the bounds of its permissible discretion when it disqualified plaintiff, an attorney, from maintaining a shareholders' derivative and class action against his former client, its directors and its parent company?

STATEMENT.

In the exercise of its discretion to regulate the conduct of attorneys appearing before it, the United States District Court for the Eastern District of Pennsylvania (Judge VanArtsdalen), disqualified an attorney, James M. Richardson ("Richardson")[1] from maintaining this shareholders' derivative and class action against his former client, its directors and its parent company, and the Court of Appeals for the Third Circuit (Judges Van Dusen and Rosenn and Senior Judge Staley) affirmed. The court denied a petition for rehearing en banc.

The action, brought by Richardson as a former shareholder of the client (and as a present shareholder of its parent), alleged violations of federal securities laws and breaches of common-law fiduciary obligations by the defendants. Named as defendants were Alexander Hamilton Life Insurance Company of America ("Hamilton Life"), its directors, its parent company, Hamilton International Corporation ("Hamilton International"), and Hamilton Life's outside accounting firm, Lybrand, Ross Bros. & Montgomery.

In his complaint, Richardson averred that, prior to August 14, 1969, he was a shareholder of Hamilton Life and that, as a result of a merger that took place on that date, Hamilton Life became a wholly-owned subsidiary of Hamilton International, and the former shareholders of Hamilton Life (including Richardson) then became shareholders of Hamilton International. The complaint asserted that a proxy statement sent to shareholders of Hamilton Life in connection with the 1969 merger was false and misleading and failed to disclose certain allegedly material facts. According to the complaint, as originally filed, the

1. Incorrectly referred to in the caption of the petition as James *R.* Richardson.

facts that should have been disclosed in the proxy statement included alleged self-dealing by the individual defendants, alleged payment of excessive salaries and fees to them and alleged payments by Hamilton Life in 1966 and 1967 of approximately $100,000 in counsel fees for the personal benefit of three individual defendants who were officers and directors of Hamilton Life.

Claiming to sue (1) on his own behalf, (2) on behalf of a class of former shareholders of Hamilton Life and (3) derivatively on behalf of Hamilton Life, Richardson sought to set aside the 1969 merger, to cancel the issuance of certain shares of stock, to obtain an accounting and to recover compensatory and punitive damages.

Respondents (the defendants other than Lybrand) moved to dismiss the action on the ground that, by virtue of his former activities as counsel for them, Richardson was disqualified from maintaining or participating in the action (57a-58a).[2] The record before the district court showed that from September 1964 through June 1966, while Richardson was associated with the Philadelphia law firm of Schnader, Harrison, Segal & Lewis, that firm did extensive legal work for Hamilton Life. Richardson himself was deeply involved in the representation of Hamilton Life, devoting 669 hours of work to the interests of this one client. In the course of this representation, Richardson acquired extensive information about Hamilton Life and its officers and directors, and he was privy to numerous confidential disclosures made by them concerning the most intimate details of the company's operations (101a-103a, 204a-205a).

The district court concluded that the type of work done by Richardson suggested that he had received confidential information about "the entire workings of Hamilton Life up to and through June 1966 and in particular as to its

2. Lybrand later joined in the motion (59a). (References are to the appendix in the court of appeals.)

finances, corporate structure and operations" (Pet. App. 12-13). The court of appeals agreed, noting that Richardson had had access to "confidential information about Hamilton Life's finances, corporate structure and operations, which he would not have received had he not been its attorney" (Pet. App. 5).

Because the facts and the logical inferences to be drawn therefrom made it plain that the relationship between Richardson's former representation and the present case was such that there was a serious danger of a violation of attorney-client confidences if Richardson were allowed to proceed with the case, the district court held that Richardson was disqualified from maintaining this action against the respondents. In an opinion (Pet. App. 10-22) that carefully weighs "the conflicting policies of the law," on the one hand to protect shareholders of a corporation and, on the other hand, to protect the attorney-client relationship (Pet. App. 11, 21), Judge VanArtsdalen concluded that, under the circumstances of this case, the attorney-client relationship must be treated as paramount and Richardson should be disqualified.

The court of appeals affirmed. In an opinion by Judge Van Dusen (Pet. App. 1-7), that court emphasized the importance of encouraging a client to reveal to his attorney all possibly pertinent information and the importance of eliminating any apprehension by the client that such confidences could later be used against him. The court of appeals pointed out that, because of the importance of safeguarding and protecting communications between attorneys and clients, courts have generally disqualified an attorney from suing a former client when the new suit is so closely connected with the subject matter of the earlier representation that confidences might be involved. The court of appeals found ample basis in the record for the district court's conclusion that the information Richardson

had received in the earlier representation might be related to the present action, and, noting its recent holding in **Greene v. Singer Co.**, 461 F. 2d 242 (3d Cir.), *cert. denied*, 409 U. S. 848 (1972), that the actions of district courts on disqualification questions should be disturbed only where it can be said that the district court abused its permissible discretion, stated that, "On this record, the district court has not exceeded the bounds of its permissible discretion" (Pet. App. 7).

The court of appeals and the district court were both careful to note in their opinions (Pet. App. 5, 22) that the disqualification of Richardson in no way precluded any other Hamilton shareholder from maintaining a suit against the respondents based on the same contentions made by Richardson. The possibility of such action became a reality after the court of appeals' affirmance of the Richardson disqualification, when a former Hamilton shareholder by the name of Owen M. Johnson, Jr. moved in the district court to intervene as a party plaintiff in this action. On February 16, 1973, Judge VanArtsdalen granted the motion.

ARGUMENT.

I.

The Decision Below Is of No Great Significance.

Richardson would have this Court believe that his case presents a matter of overwhelming significance both to the parties and to the profession generally. This is a blatant exaggeration.

As for the profession generally, all the decision below represents is another in a long line of cases wherein the lower federal courts, in order "to safeguard the sacrosanct privacy of the attorney client relationship,"[3] have warned lawyers that they are precluded from participating in litigation against former clients when there is a danger that confidential information acquired by them in the course of the former representation will be used to the disadvantage of the former client. See, *e.g.*, **American Can Co. v. Citrus Feed Co.**, 436 F. 2d 1125 (5th Cir. 1971); **Waters v. Western Co.**, 436 F. 2d 1072 (10th Cir. 1971); **Uniweld Products, Inc. v. Union Carbide Corp.**, 385 F. 2d 992 (5th Cir. 1967), *cert. denied*, 390 U. S. 921 (1968); **Chugach Electric Ass'n v. United States District Court**, 370 F. 2d 441 (9th Cir. 1966), *cert. denied*, 389 U. S. 820 (1967); **Cord v. Smith**, 338 F. 2d 516 (9th Cir. 1964); **United States v. Trafficante**, 328 F. 2d 117 (5th Cir. 1964); **Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp.**, 216 F. 2d 920 (2d Cir. 1954); **Emle Industries, Inc. v. Patentex**, [1972] Trade Cas. ¶ 73,976 (S. D. N. Y.); **Estates Theatres, Inc. v. Columbia Pictures Industries, Inc.**, 345 F. Supp. 93 (S. D. N. Y. 1972); **Doe v. A Corp.**, 330 F. Supp. 1352 (S. D. N. Y. 1971), *aff'd sub nom.* **Hall v. A Corp.**, 453 F. 2d 1375 (2d Cir. 1972); **E. F. Hutton & Co. v. Brown**, 305 F. Supp. 371 (S. D. Tex. 1969); **Shelley v. The Maccabees**, 184 F. Supp.

3. **American Can Co. v. Citrus Feed Co.**, 436 F. 2d 1125, 1128 (5th Cir. 1971).

797 (E. D. N. Y. 1960), *cert. denied,* 365 U. S. 818 (1961); **Marco v. Dulles,** 169 F. Supp. 622 (S. D. N. Y.), *appeal dismissed,* 268 F. 2d 192 (2d Cir. 1959); **Fleischer v. A. A. P., Inc.,** 163 F. Supp. 548 (S. D. N. Y. 1958), *appeal dismissed sub nom.* **Fleischer v. Phillips,** 264 F. 2d 515 (2d Cir.), *cert. denied,* 359 U. S. 1002 (1959); **Empire Linotype School v. United States,** 143 F. Supp. 627 (S. D. N. Y. 1956); **United States v. Standard Oil Co.,** 136 F. Supp. 345 (S. D. N. Y. 1955); **T. C. Theatre Corp. v. Warner Bros. Pictures, Inc.,** 113 F. Supp. 265 (S. D. N. Y. 1953).

The lower federal courts have not hesitated to enter disqualification orders in appropriate cases. "To disqualify his former attorney, the former client need show no more than that the matters involved in the pending suit in which his former attorney represents his adversary are substantially related to the matters or cause of action in which the attorney previously represented him, the former client." **American Can Co. v. Citrus Feed Co.,** *supra,* at 1128.

The only aspect of Richardson's case that was in any way different from the general run of cases is that Richardson himself (represented by his law partner) was the litigant opposing the former clients, rather than the litigant's attorney. But there is certainly nothing startling—or even unprecedented—about a court's applying the standards developed in the latter context to this situation. It is difficult to imagine that any lawyer would seriously believe that he has the right to be a plaintiff in a suit against a former client in a setting where he would be barred, on ethical grounds, from acting as attorney for some other plaintiff. And it is even harder to conceive that any court would hold that a lawyer-plaintiff owes a lesser obligation to his former client than a lawyer who acts only as attorney for the plaintiff. If anything, courts should be

more, not less, prone to disqualify a lawyer who is the plaintiff than one who is an attorney for the plaintiff, since there are no third persons whose interests have to be considered when the lawyer and the plaintiff are one and the same.

The fundamental objectives of disqualification, when it is necessary, are preservation of the integrity of the legal profession and protection of the attorney-client relationship through assurance to the client that matters revealed by him in confidence to his attorney will not be used against the client in the future. It is to prevent that potential abuse of the prior attorney-client relationship that the courts have fashioned the rule prohibiting an attorney from proceeding against his former client when there is a substantial relationship between the prior representation and the present suit. The reason for the rule is equally applicable whether the position of the attorney in the suit is that of litigant or that of counsel. The potential abuse of confidence is the evil in either case.

The decision below should be of no concern to lawyers who live up to their moral and ethical obligation to strive to avoid all appearances of impropriety. See Canon 9, American Bar Association Code of Professional Responsibility. See also **United States v. Trafficante**, 328 F. 2d 117, 120 (5th Cir. 1964), where the court stated:

> "The Preamble to the Canons of Ethics admonishes the members of the bar that their conduct should be such as to merit the approval of all good men. That conduct should not be weighed with hair-splitting nicety. We have found no exceptions to the exhortation to 'abstain from all appearances of evil.' 1 Thessalonians 5:22."

As for the parties themselves, the decision below obviously has had the salutary effect of cleansing the record of

the appearance of professional impropriety and avoiding the danger that confidential information might be misused. From the defendants' standpoint, that is about all that has been accomplished. Certainly, the disqualification of Richardson does not permit the defendants to "get away" with anything. The courts below made it clear that the action was not being dismissed in its entirety, and they expressly left it open to other Hamilton shareholders to maintain another action based on the same contentions made by Richardson. The proof of this is seen in the fact that, subsequent to the decision of the court of appeals in this case, another Hamilton shareholder, Owen M. Johnson, Jr., was permitted to intervene in the district court as a named plaintiff. Thus, the action commenced by Richardson continues in a viable state against the defendants. All that has been changed is the identity of the plaintiff and the plaintiff's attorney.

Nor has the ruling below had any real effect on Richardson's substantive rights. True, Richardson has been precluded from actively participating in the action, but that preclusion has in no way affected his substantive rights. Richardson is still a member of the plaintiff class, and there is absolutely nothing in the opinions below that would preclude him from sharing in any recovery that might be obtained for the plaintiff class if the action is permitted to proceed as a class action. If the class has a valid claim, Johnson would appear to be as well equipped as Richardson to pursue that claim on behalf of the class. Richardson's only advantage over Johnson stems from the insight into Hamilton's affairs and the confidential information garnered by him during the course of his former representation—the very circumstances that required his disqualification.

Far from being deprived of substantive rights, what Richardson has really lost as a result of the disqualification

ruling is the potential counsel fee that might be earned by an attorney who wins the race to the courthouse and acts as counsel for a class representative. That is really what Richardson's petition for certiorari is all about. If Richardson were truly concerned about correcting the alleged violations of the securities laws about which he complains, he would not have petitioned for certiorari but would have let the action proceed in the district court with Johnson as the sole class representative. Richardson's filing of the petition was, we submit, motivated solely by greed, the greed that overtakes an attorney's sense of values when he visualizes himself as counsel for a huge class in an action in which many dollars may be involved.

II.

There Is No Significant Due Process Question in This Case.

Richardson's argument that the disqualification order has somehow deprived him of his property without due process of law is completely specious. The decision below has taken no property from Richardson. He still owns his shares of stock in the company. He has not been deprived of any right to participate in any recovery that might be obtained for a class. All the courts below did was hold that, because of the importance of preserving and protecting the attorney-client relationship, Richardson should not be permitted to be an active litigant in this case.

Such a ruling did not deprive Richardson of any property rights. When one becomes a member of the bar, he undertakes certain obligations, including the obligation to preserve the confidences of each of his clients and not sue a former client when there is a danger that, intentionally or unintentionally, he may "make use of confidential information received from the former client while espousing his cause." **T. C. Theatre Corp. v. Warner Bros. Pictures, Inc.,**

supra, at 269. When a lawyer purchases shares of stock in his client's business, he does so not as a general member of the public but as an attorney who is subject to restrictions on what he can and cannot do. At the very moment Richardson purchased his shares of stock in Hamilton, he was acting as Hamilton's attorney (103a-104a), and he was, therefore, subject to these inhibitions. There was no deprivation of due process.

III.

There Is No Significant Question Under the Rules Enabling Act.

In this Court, Richardson argues for the first time that the actions of the courts below in disqualifying him as a party plaintiff in this case violated the Rules Enabling Act.

Not having been raised in the courts below, this issue is not properly before this Court. See **Walters v. St. Louis,** 347 U. S. 231, 233 (1954).

Moreover, the argument itself is, in any event, totally lacking in merit. The courts below were not relying on any particular rules of court when they disqualified Richardson. They were relying on an inherent power. It has long been recognized in the federal courts that the power to disqualify an attorney from participating in litigation adverse to the interests of a former client does not depend on the specific language of a particular rule of court but arises from an inherent power of courts to supervise the conduct of attorneys practicing before them. See authorities collected in **E. F. Hutton & Co. v. Brown,** 305 F. Supp. 371, 377 n. 7 (S. D. Tex. 1969).

Further, even if it could be said that the action of the courts below in disqualifying Richardson was bottomed on local Rule 11 of the United States District Court for the Eastern District of Pennsylvania (which adopts the Ameri-

can Bar Association Canons of Ethics as "standards of conduct for attorneys of this Court"), the fact of the matter is that the adoption of local Rule 11 did not "abridge, enlarge or modify any substantive right" that Richardson possessed. For, with or without local Rule 11, Richardson was duty bound to conform his conduct to the American Bar Association's Canons of Ethics and Code of Professional Responsibility. The Canons were adopted in 1908—some forty years before Congress's adoption of the Rules Enabling Act. Richardson was subject to the inhibitions of the Canons of Ethics from the moment of his admission to the bar in 1955 and of the Code of Professional Responsibility from January 1, 1970, the date it became automatically effective in Pennsylvania. Pa. R. Civ. P. 205. Local Rule 11 added nothing to this obligation.

IV.

The Courts Below Applied the Prevailing Standards Applicable to Motions to Disqualify.

It is well settled that this Court ordinarily will "not grant a certiorari to review evidence and discuss specific facts." **United States v. Johnston,** 268 U. S. 220, 227 (1925). There is even less reason for this Court to take a case to review a factual issue where the factual determination of the district court has received the concurrence of the court of appeals. This Court has often held that " a court of law, such as this Court is, rather than a Court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." **Graver Mfg. Co. v. Linde Co.,** 336 U. S. 271, 275 (1949), *aff'd on rehearing,* 339 U. S. 605 (1950); **Berenyi v. Immigration Director,** 385 U. S. 630, 635 (1967).

A review of factual determinations is exactly what Richardson seeks here.

Richardson argues that the district court and the court of appeals cast aside the "prevailing standard" in favor of some new standard, but an examination of the petition and the opinions below makes clear that this is not so. Thus, according to the petition (Pet. 28), "the prevailing standard in the lower federal courts" is the "substantial relation" test set forth in **T. C. Theatre Corp. v. Warner Bros. Pictures, Inc.**, 113 F. Supp. 265 (S. D. N. Y. 1953). Far from deviating from the **T. C. Theatre** opinion, both of the courts below relied on it. Thus, the district court's opinion states (Pet. App. 15-16):

> "The oft quoted case, *T. C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S. D. N. Y. 1953), provides the insight to the standards here applicable."

And the court of appeals' opinion says (Pet. App. 4):

> "The plaintiff contends that it is incumbent on the defendants to come forward with evidence to demonstrate that the previous representation is related to the present representation. The rule, however, is clear that the defendants need not show by direct evidence that Mr. Richardson acquired information in the course of the previous litigation which is to be used in the pending action. They only need to show that Mr. Richardson might have acquired substantially related material. *T. C. Theatre Corp. v. Warner Bros. Pictures, supra.* . . ."

Thus, what we have in the opinions below is not a denial of the "substantial relationship" test but a reaffirmation of it.

Richardson's real claim then is not that the proper test was ignored but that it was misapplied in the context of the facts of this case. But, as noted above, it is plain that the question of whether a particular standard has been applied correctly in a particular factual setting is not the type of question on which this Court should exercise its discretionary power of review on certiorari.

V.

There Is No Conflict Among the Circuits.

Richardson strains to establish (Pet. 30-33) that the decision below has created some sort of conflict among the circuits on the question of who has the burden of proof in disqualification matters. But this is not so. The courts below did not purport to deviate from the prevailing approach to the question of disqualification. They did not "thrust the burden of proof back upon [petitioner] to show no relation between the matters" (Pet. 31).

What the courts below did was to hold that the facts adduced by the respondents and the logical inferences to be drawn therefrom were sufficient to demonstrate that the relationship between Richardson's former representation and the present case was such that there was a serious danger of a violation of attorney-client confidences if Richardson were allowed to proceed as plaintiff. There is nothing remarkable about such a conclusion. In one of the cases heavily relied on by petitioner, it was pointed out that "the pragmatic test for disqualification is whether the prior matters or evidence concerning them may be admitted into evidence with respect to the current litigation." **Fleischer v. AAP, Inc.**, *supra*, 163 F. Supp. at 553.

Certainly, the affidavits and deposition testimony that made up the record in the district court revealed that evidence concerning the prior matters would be admissible in

this case. The most apparent such matter concerns the $100,000 in counsel fees. In his prior representation, Richardson worked on, and received confidential disclosures pertaining to, the very same matter that ultimately gave rise to Hamilton Life's paying the counsel fees. In the present case, Richardson attacked the propriety of that payment, contending that it was for the individual benefit of three officers and directors and not for the benefit of the company itself. When he filed his complaint, Richardson was fully aware that counsel for the company had taken the position that the payment of these fees was for the benefit of the company (119a-121a, 179a, 182a). It seems perfectly obvious that proper resolution of this dispute must, of necessity, require inquiry into the same underlying factual situation that Richardson investigated on Hamilton Life's behalf and as to which Hamilton Life and the three individuals imparted confidential information to him, as Richardson admitted in his deposition. Certainly, there is a "substantial relationship" between Richardson's former representation and this aspect of the lawsuit Richardson sought to maintain.[4]

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4. In a footnote running three pages (footnote 3, Pet. 11-13), Richardson seeks to establish that the issue of the $100,000 in counsel fees was effectively eliminated from the case when he amended his complaint to delete a specific claim against the respondents relating to the payment of those fees, a deletion that Richardson has the temerity to state "was not undertaken to avoid an imputation of conflict of interest, as respondents attempted to suggest in the proceedings below" (Pet. 11).

The amended complaint did not delete the issue of the $100,000 in counsel fees from the case. All it did was change the emphasis. Thus, whereas the original complaint contained three specific charges relating to the $100,000 in counsel fees [paragraphs 14(c), 33(i) and 34(a)(iii)], the amended complaint made only a single specific reference to the payment of those fees [paragraph 34(a)(iii)] but continued to use general catchall language which could be said to incorporate these charges by reference [*e.g.*, paragraph 33(i)]. Moreover, even if it could be said that the amended complaint effectively dropped from the case Richardson's claim against the respondents based on the payment of the $100,000 in counsel fees, the

4. (Cont'd.)

amended complaint kept the issue of those fees in the case by continuing to assert a claim against Lybrand based on that defendant's failure to disclose the payment of those fees. So long as questions relating to those fees remained in the case, the potentiality existed that Richardson might use confidential information derived from the attorney-client relationship to the detriment of his former client.

But what is most disconcerting about the footnote in Richardson's petition is the representation that Richardson's deletion of the allegations relating to the $100,000 counsel fees "was not undertaken to avoid an imputation of conflict of interest." The explanation set forth in the petition about Richardson's reasons for amending the complaint (his alleged receipt between the original complaint and the amended complaint of a preliminary prospectus issued almost four months before the filing of the original complaint and his alleged decision based on a perusal of that prospectus to drop the claim for a return of the $100,000 in counsel fees because he now felt that the corporation had "satisfied any reasonable demand for relief which could have been made against it for payment of the legal fees") finds absolutely no support in the record of this case and is inherently incredible.

The original complaint in this case was filed on March 24, 1971 (1a), almost four months after the date of the preliminary prospectus (Pet. App. 36-38), and the amended complaint was not filed until July 27, 1971 (2a). In the interim between those two dates, counsel for the respondents told Richardson and his counsel that the respondents were going to raise the question of Richardson's disqualification, and the respondents made this a matter of record on July 19, 1971 (2a), eight days before Richardson filed his amended complaint, when they filed a memorandum in opposition to Richardson's class action motion in which they stated, *inter alia*, "The motion is premature, having been made prior to resolution of a more basic question, to wit whether plaintiff and his counsel are disqualified from maintaining the action in view of plaintiff's prior involvement as counsel for Alexander Hamilton Life Insurance Company of America, one of the defendants herein. This question will be raised by separate motion." On August 2, 1971 (60a), five days after the amended complaint was filed, counsel for the respondents deposed Richardson. Each time counsel asked about Richardson's reasons for deleting the counsel fee reference in the amended complaint, Richardson's counsel (and law partner) asserted that this was a privileged matter and instructed Richardson not to answer. Richardson refused to answer (109a-114a, 160a-164a).

The obvious inference from all this was that Richardson had deleted the reference to the $100,000 in counsel fees from certain portions of the complaint in preparation for the anticipated challenge to his qualification to maintain this action. Richardson never en-

Richardson's disqualification runs even deeper than his prior involvement with the portion of the case relating to the $100,000 in counsel fees. In his former representation of Hamilton Life, in the course of preparing a registration statement for that company, in the course of conducting his investigation into the subjects raised by an SEC investigation, in the course of examining files, in the course of interviewing the officers and directors, in the course of preparing them for their testimony, and in the course of being generally privy to confidential disclosures by Hamilton Life and its officers and directors during the period of the Schnader, Harrison, Segal & Lewis representation of that company, Richardson acquired confidential information about the most intimate details of the company's operations. Because of these intimate and detailed discussions and disclosures, there was a serious danger that Richardson would make improper use of confidential informa-

4. (Cont'd.)

deavored to dispute this inference in the district court. Indeed, he never endeavored to offer the district court any explanation at all for the deletion.

The first time Richardson made any effort whatsoever to explain the deletion was during oral argument in the court of appeals when his counsel (and law partner), in response to a question from the bench, said:

> "The amendment was made because as a result of a filing that defendants had made with the Securities & Exchange Commission, a registration statement which we wrote away and asked for, we found that suit had been started in Detroit for the recovery of this $100,000 in fees. This statement was made in the registration statement to the SEC, so we felt it no longer needed to be made by us." (Page 7 of unofficial transcript of argument before court of appeals filed with the petition for certiorari.)

This cryptic and somewhat ambiguous explanation to the court of appeals has been blown up into a full-scale scenario in this Court, complete with an exhibit (Pet. App. 35-38) that has first seen the light of day in the petition. This belated "explanation" was not presented to the district court and has never been put to the test of cross-examination, a test we are certain it could never withstand.

tion. To use the language of the Court of Appeals for the Ninth Circuit in **Chugach Electric Ass'n v. United States District Court**, 370 F. 2d 441, 443 (9th Cir. 1966), *cert. denied*, 389 U. S. 820 (1967), a "likelihood here exists which cannot be disregarded" that Richardson's "knowledge of private matters gained in confidence would provide him with greater insight and understanding of the significance of subsequent events. . . ."

That was enough to require his disqualification.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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April 23, 1973.